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80-1577

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No.

CITY OF MESQUITE,

Appellant,

v.

ALADDIN'S CASTLE, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Do children under the age of seventeen have an unconditional and unqualified constitutional right to play coin-operated amusement machines located in a commercial establishment?

2. Is the term "connection with criminal elements" unconstitutionally vague when such language is merely an "in house" directive to the Chief of Police to investigate an applicant's (applicant for a license to operate pinball machines) character and the Chief of Police has no power to issue or deny a license?

3. Are these issues justiciable at the instance of the owner of a commercial amusement enterprise who itself had received a license to operate coin-operated amusement machines?

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In The

Supreme Court of the United States

October Term, 1980

City of Mesquite,

Appellant,

v.

Aladdin's Castle, Inc.

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

REPORTS OF OPINIONS BELOW

1. *Aladdin's Castle, Inc. v. City of Mesquite,* 630 F.2d 1029 (5th Cir. 1980).

2. *Aladdin's Castle, Inc. v. City of Mesquite,* 434 F.Supp. 473 (N.D.Tex 1977).

GROUNDS OF JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

1. *Nature of the Proceeding:* This is a proceeding by Aladdin's Castle, Inc. for injunctive relief prohibiting enforcement of portions of a city ordinance regulating

coin-operated amusement machines and for declaratory relief invalidating other portions of the same ordinance alleging that the challenged portions of the said ordinance are repugnant to the 14th Amendment to the United States Constitution. According to the United States Court of Appeals for the Fifth Circuit, statutory jurisdiction exists under 28 U.S.C. §§1331 and 1332. *Aladdin's Castle, Inc. v. City of Mesquite,* 630 F.2d 1029, 1036 n.12 (5th Cir. 1980)

2. Relevant dates.

(a) Judgment or decree sought to be reviewed was entered on November 17, 1980.

(b) Order denying the motion for rehearing was entered December 15, 1980.

(c) The judgment entered on November 16, 1980, was issued as a mandate on January 6, 1981.

(d) Notice of Appeal was filed in the United States Court of Appeals for the 5th Circuit on March 10, 1981.

3. The statutory provision believed to confer jurisdiction of this Appeal on the Supreme Court of the United States is 28 U.S.C. §1254(2)

CONSTITUTIONAL PROVISIONS AND ORDINANCES

1. The 14th Amendment to the United States Constitution (see appendix).

2. Ordinance No. 1353, Code of the City of Mesquite (see appendix).

STATEMENT OF THE CASE

The City of Mesquite, as do most cities of the State of Texas, regulates the commercial operation of coin-operated amusement machines under its delegated powers as a home

rule city. Aladdin's Castle, Inc., the Appellee, was licensed under the city ordinance to operate such an enterprise.

The Appellee initially sued the city to enjoin the enforcement of the age restriction found in city ordinance No. 1353. Section five of that ordinance makes it unlawful for an owner or operator of coin-operated amusement machines to allow a child under the age of 17 to play such machines if the child is not accompanied by a parent or guardian. The child can play if accompanied by a parent or guardian, and even without a parent or guardian present there is no prohibition of his socializing or associating with others in such a commercial establishment.

The City of Mesquite licenses those who wish to maintain a coin-operated amusement establishment in the city limits. Upon receiving an application for a license, the ordinance directs the Chief of Police, among others, to make a recommendation on the license application. The ordinance directs that his recommendation shall consider, among other things, the applicant's "connections with criminal elements" (if any). By supplemental complaint, Appellee asserted that the quoted language was unconstitutionally vague. Appellant raised the question of the justiciability of the vagueness issue in its Reply To Motion to File Supplemental Complaint.

The trial court awarded Aladdin's Castle, Inc. the declaratory relief it sought on the grounds that the "connection with criminal elements" language was unconstitutionally vague. This holding also resolved the issue of justiciability.

Utilizing the rational relation standard of review, the trial court upheld the qualification created by the ordinance on the right of children to play coin-operated machines unaccompanied by parent or guardian and thus denied the injunctive relief sought by Appellee.

Both sides appealed raising the same issues. The Fifth Circuit affirmed the "vagueness" holding and reversed the denial of injunctive relief saying that the creation of a qualification on the right to play coin-operated amusement machines was unconstitutional under both the "rational relation" and the "strict scrutiny" standards of judicial review. No party contended that the "strict scrutiny" standard was applicable. It was applied by the Fifth Circuit on its own motion and was mentioned for the first time at oral argument.

REASONS FOR PLENARY CONSIDERATION

The Fifth Circuit characterized the right of a child to play coin-operated amusement machines in an arcade as a constitutionally protected "right of social association". Consequently, this case poses the question of the existence (or non-existence) of a constitutional right of association in a social (and therefore non-political) context. It also raises the question of whether such a right (if it exists) applies to with equal force to both adults and children and whether a corporate commercial enterprise has standing to assert that alleged right of individual children (none of whom are parties to the litigation). As the Fifth Circuit said

> The Supreme Court has never ruled directly on the application of the right of association in a social context such as the present one.

630 F.2d 1029 at 1041.

At issue is the scope or extent of the First Amendment guarantee of the freedom of association. The application of this guarantee in a social and economic context involving children presents (as the Fifth Circuit recognized) a case of first impression in this Court.

The ordinance struck down in this case is the type of ordinance this Court has characterized as "social and economic" legislation. See *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

Plenary consideration of this question is required because, without a clarification by this Court of the reach (into non-political areas) of the right of association, no legislative body can be certain which of its social and economic statutes or ordinances (in the words of the Fifth Circuit) "impermissibly trammel(s) fundamental rights." (630 F.2d at 1041). The Fifth Circuit's recognition of a constitutional "freedom of association in a social context" creates the same kind of uncertainty as to the validity of social and economic legislation as was once created by the recognition of a constitutional "freedom of contract." This is so despite the Fifth Circuit's (at 630 F.2d. 1044) express disapproval of *Lochner v. New York*, 198 U.S. 45 (1905).

As to the void for vagueness holding, in context the challenged language ("connection with criminal elements") is simply a directive from the City Council to its Police Chief as to how to perform his duties. Under the challenged ordinance, the Chief of Police is not authorized to grant or deny a permit. The Council has granted to the City Manager this discretion in the first instance, reserving to themselves the authority to review the City Manager's decision in the event of an appeal by an applicant and has further provided for judicial review of their decision. Any error on the part of the Police Chief due to the allegedly vague language must survive several tiers of review. Neither the trial court nor the court below has considered the language in its context.

If each and every "in house" directive must be worded with the precision of a criminal statute, the day to day

activities of all governments and executive agencies (both state and federal) will be severely hampered.

Appellant asserts there is an urgent (urgent because of the vast implications of the Fifth Circuit holding) need for this Court to articulate the test for distinguishing those non-political, social or economic activities that are within the "penumbra" of the First Amendment (and thus clothed with constitutional immunity from governmental regulation) from those social and economic activities that are not protected by any "constitutional right to social association" (and thus are subject to regulation). Should the Court concur with appellant on the need for an authoritative statement on this point and should the Court conclude review by writ of certiorari would be a more appropriate vehicle for mapping these uncharted waters, appellant asks that this jurisdictional statement be considered, in the alternative, as a writ of certiorari.

Respectfully Submitted,

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APPENDIX

UNITED STATES CONSTITUTION, AMENDMENT 14 § 1

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ORDINANCE 1353 OF THE CODE OF THE CITY OF MESQUITE

AN ORDINANCE OF THE CITY OF MESQUITE, TEXAS, REPEALING ORDINANCE NUMBER 1310 OF THE CITY OF MESQUITE AND AMENDING ORDINANCE 1103 OF THE CITY OF MESQUITE BY PROVIDING REGULATION OF AND ESTABLISHING A LICENSE FEE FOR COIN-OPERATED AMUSEMENT ESTABLISHMENTS; PROHIBITING THE PLAYING OR OPERATION OF COIN-OPERATED AMUSEMENT MACHINES BY PERSONS UNDER SEVENTEEN (17) YEARS; PROVIDING EXCEPTIONS; PROVIDING FOR REVOCATION OF LICENSE; PROVIDING A RIGHT AND MANNER OF APPEAL; PROVIDING CERTAIN DEFINITIONS; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A PENALTY NOT TO EXCEED TWO HUNDRED DOLLARS ($200.00) FOR EACH OFFENSE; AND DECLARING AN EMERGENCY.

WHEREAS, coin-operated amusement establishments have a tendency to attract patrons of tender years, and

WHEREAS, the congregation of youthful patrons creates problems of policing due to the need to protect such patrons from the influences of those who would promote gambling, sale of narcotics and other unlawful activities; and

WHEREAS, it is vital to the safety and welfare of the inhabitants of the City of Mesquite and particularly those of tender years for whom a special duty is imposed upon the governing body to protect, that proper and suitable operators only are licensed to operate coin-operated amusement establishments and that such establishments be regulated to that end; and

WHEREAS, it has been determined that the attraction of such establishment for those under seventeen (17) years of age is detrimental to such persons and to the health and welfare of the inhabitants of the City, generally.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MESQUITE, TEXAS:

SECTION 1. That Ordinance Number 1310 of the City of Mesquite passed on the 5th day of April, 1976, is hereby repealed.

SECTION 2. That Ordinance 1103 is hereby amended to read as follows:

SECTION 3. It is hereby declared to be unlawful to own, display or operate coin-operated amusement machines or apparatus in the City without a license issued by the City of Mesquite therefor.

SECTION 4. It is hereby declared to be unlawful to own, operate or maintain a coin-operated amusement establishment in the City without a license issued by the City of Mesquite therefor.

SECTION 5. It shall be unlawful for any owner, operator or displayer of coin-operated amusement machines to allow any person under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless such minor is accompanied by a parent or legal guardian.

SECTION 6. *License:* Any person desiring to obtain a license for a coin-operated amusement machine may apply to the Assessor Collector of Taxes of the City of Mesquite on a form to be furnished by the City showing the type of machine to be licensed, serial number, location, name of establishment and name of the owner or person in control of such machine together with the name and title of person making the application if other than the owner.

Upon payment of the license fee the Assessor-Collector shall issue a license which shall be valid for such machine for one (1) year.

Any person desiring to obtain a license for a coin-operated amusement establishment shall apply to the City Secretary by original and five (5) copies, one of which shall be routed to the City Manager, Chief of Police, Chief Building Inspector and City Planner, for review.

Upon approval by each of the parties and payment of the license fee, the City Secretary shall issue a license for such establishment, which shall be valid for one (1) year and shall be non-transferable.

The Chief of Police shall make his recommendation based upon his investigation of the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude and connections with criminal elements, taking into consideration the attraction by such establishments of those of tender years.

The Chief Building Inspector and City Planner shall determine compliance with applicable building and zoning ordinances of the City.

When the City Manager has received the recommendations from the Chief of Police, Chief Building Inspector

and City Planner, he shall review such application together with such recommendations as may be furnished and shall approve such application or disapprove same with written notation of his reasons for disapproval.

Upon disapproval, the applicant may make such corrections as noted and request approval, request withdrawal and refund of license fee, or give notice of appeal from the City Manager's decision.

In the event of appeal from the City Manager's decision the applicant shall give written notice of his intention to appeal within ten (10) days of notice of the City Manager's decision. Such appeal shall be heard by the City Council within thirty (30) days from date of such notice unless a later date is agreed upon by applicant.

Upon appeal to the City Council of the City Manager's decision based upon an adverse recommendation by the Chief of Police as to applicant's character, the applicant shall have the same burden as prescribed in Article 305, V.A.C.S. to show to the Council that he or it is of good character as a law abiding citizen to such extent that a license should be issued.

Upon hearing the Council may reverse the decision of the City Manager in whole or in part or may affirm such decision.

An applicant may appeal such decision to the District Court within thirty (30) days but such appeal shall be upon the substantial evidence rule.

For violation of any of the requirements of this ordinance the City Manager may upon three (3) days notice of Licensee revoke the license granted hereunder. The same rights of appeal shall exist upon revocation as upon disapproval of the original application.

A person licensed hereunder, by acceptance of such license authorizes the City and its designated personnel to make inspections of the premises, facilities, manner of operation and character of any employee.

The holder of a license hereunder shall comply with all ordinances and requirements of the City of Mesquite and all laws of the State of Texas.

SECTION 7. There is hereby levied a license fee of Ten Dollars ($10.00) for each coin-operated amusement machine and a license fee of One Hundred Dollars ($100.00) for each coin-operated amusement establishment in the City.

The license of a coin-operated amusement establishment shall not exempt the owner or operator from the license fee of individual machines or obediance to any other ordinance of the City of Mesquite, including the prohibition of pool halls.

SECTION 8. *Exceptions:* This ordinance shall not apply to any agency of the United States Government, State of Texas or political subdivision thereof.

Any charitable organization operating or displaying such machines in connection with charitable activities on premises exempt from payment of ad valorem taxes under State law because of such charitable activities shall be exempt from the provisions of this ordinance to such extent.

SECTION 9. *Definitions:* For the purpose of this ordinance the following words and terms are defined as follows:

Coin-Operated Amusement Machine — Means a machine or apparatus that may be played or operated by the insertion of a coin and on which games or tests of skill,

chance or ability are played, including pinball machines, and any machine initiating games of sport, shooting, or guiding objects or any machine designed for amusement or relaxation. but not including machines for vending food, drink and tobacco products, music playing or recording or apparatus commonly known as kiddie rides.

Coin-Operated Amusement Establishment — Means any business or commercial establishment or other building or location wherein three (3) or more coin-operated amusement machines are displayed.

Connection With Criminal Elements is defined as that state of affairs wherein an applicant, or an officer of, principal stockholder of, person having a substantial interest in or management responsibility for, a corporation or other organization wherein such organization is the applicant, directly or as parent, subsidiary or affiliate, has such association, acquaintance, or business association with parties having been convicted of a felony or crime involving moral turpitude or are otherwise involved in unlawful activities, whether convicted or not, to the extent that the fencing of stolen merchandise or illegally obtained funds, the procuring of prostitutes, the transfer or sale of narcotics or illegal substances is made more feasible or likely or the protection of those of tender years from such unwholesome influences are rendered more difficult.

A determination by the United States Department of Justice that a party is a member of the "mafia" or "Cosa Nostro" family or that such party is engaged in or affiliated with a nationwide crime organization, whether formally or informally, shall be prima facia evidence, so far as the issuance of a license hereunder, that such person has "connections with criminal elements" and

constitute, within the meaning of this ordinance, "criminal elements".

Character as a law abiding citizen shall mean substantially that standard employed by the Supreme Court of the State of Texas in the licensing of attorneys as set forth in Articles 305 and 306, Vernon's Annotated Civil Statutes but expressly excludes conviction by any parties of traffice violations of a Class C misdemeanor grade.

SECTION 10. *Legislative Policy:* It is the policy of the City of Mesquite, in the enforcement and interpretation of this ordinance, to discourage and prohibit the operation, control or interference in the operation of coin-operated amusement facilities by organized crime.

The attraction by the vending industry in general and amusement facilities in particular of criminal elements of our society is recognized and such is determined to be contrary to the welfare of the inhabitants of the City of Mesquite.

SECTION 11. That should any paragraph, sentence, subdivision, clause, phrase, section or provision of this ordinance be adjudged or held to be unconstitutional, illegal, or invalid, the same shall not affect the validity of this ordinance as a whole or any part or provision hereof other than the part so decided to be unconstitutional, illegal or invalid and shall not affect the validity of any other provision of the Code of the City of Mesquite.

SECTION 12. That any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction in Corporation Court shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) for each offense.

SECTION 13. The fact that the City of Mesquite has no adequate ordinance regulating the operation of coin-operated machines or establishments wherein such machines are located in the City creates an urgency and an emergency and in the preservation of the public health, safety and welfare of its citizens requires that this ordinance shall take effect immediately from and after its passage and the publication of the caption as the law and charter in such cases provide.

DULY PASSED AND APPROVED by the City Council of the City of Mesquite, Texas, on the 7th day of February, A.D., 1977.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF MESQUITE

Appellant,

v.

ALADDIN'S CASTLE, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL APPENDIX TO JURISDICTIONAL STATEMENT

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ALADDIN'S CASTLE, INC., Plaintiff-Appellant, Cross-Appellee,

v.

The CITY OF MESQUITE, Defendant-Appellee, Cross-Appellant.

No. 77-2990.

United States Court of Appeals,
Fifth Circuit.

Nov. 17, 1980.

Rehearing and Rehearing En Banc
Denied Dec. 15, 1980.

Appeals from the United States District Court for the Northern District of Texas.

Before AINSWORTH, VANCE and ANDERSON, Circuit Judges.

VANCE, Circuit Judge:

This case arises from Aladdin's Castle, Inc.'s attempt to operate a coin-operated amusement center in Mesquite, Texas. Two questions dominate these appeals. First, did the district court correctly rule that Mesquite's licensing statute for owners of coin-operated amusement centers was unconstitutionally void for vagueness? Second, did the district court properly sustain as constitutional a Mesquite ordinance which barred individuals under seventeen years of age from entering such establishments to operate the machines unless accompanied by an adult? We affirm on the vagueness issue. We reverse on the age limitation issue and remand for further proceedings consistent with our opinion.

I. FACTS

Aladdin's Castle, Inc.[1] owns and manages approximately one hundred family amusement centers throughout the United States, including three centers in Texas. Typically located in suburban shopping areas, each Aladdin's center contains a variety of coin-operated amusement devices. Adults run and supervise the patrons' use of these centers. Their duties include the enforcement of Aladdin's rules prohibiting loitering, gambling, smoking, and the consumption of food, nonalcoholic drinks and alcoholic beverages on the premises. These rules exist in all such centers operated by Aladdin's. Aladdin's Castle also enforces a rule that bars school children from the establishment during school hours.

Approximately five years ago, Aladdin's began discussions with Homart, Inc., a subsidiary of Sears Roebuck and Co., concerning the possibility of opening a coin-operated family amusement center in the Town East Mall that Homart was developing in Mesquite. During these negotiations, Aladdin's discovered two legal obstacles to the proposed deal. First, the Town East Mall was not properly zoned for Aladdin's proposed business use. Second, Mesquite had an ordinance, No. 1103, prohibiting children under the age of seventeen from playing coin-operated games.[2]

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[1] Aladdin's Castle, Incorporated was formed by Jules Millman in 1969. Aladdin's stock was sold in April 1974 and is now owned by Bally Manufacturing Corporation, a publicly held corporation that is listed on the New York Stock Exchange.

[2] ORDINANCE NO. 1103

. . . . .

SECTION 3. It shall be unlawful for any owner, operator or displayer of coin-operated amusement machines to allow any person under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless such minor is accompanied by a parent or legal guardian.

After making these discoveries, representatives of Aladdin's attended a meeting of the Mesquite City Council. Aladdin's expressed its interest in opening an amusement center in Town East. It asked whether the city would change its zoning to allow Aladdin's to do business in the Town East Mall and whether the city would remove ordinance No. 1103, which restricted children and young adults from using coin-operated products and games. Aladdin's informed the council that unless the age restriction was revoked it could not open a profitable center. After considering the manner in which Aladdin's operated its amusement centers, the city council agreed to Aladdin's requests. The council explicitly encouraged Aladdin's investment in Mesquite, although it noted that Aladdin's would not be issued a license until it had finished building its store.

On April 5, 1976, Mesquite passed two ordinances pursuant to Aladdin's requests. Ordinance No. 1314 amended Mesquite's comprehensive zoning ordinance to authorize the establishment of a coin-operated amusement center at Town East Mall.[3] Ordinance No. 1310 amended ordinance No. 1103 to permit children to utilize coin-operated amusement de-

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[3] ORDINANCE NO 1314

. . . . .

SECTION 1. That the Comprehensive Zoning Ordinance of 1973, duly passed by the City Council of the City of Mesquite, Texas, on the 4th day of September, 1973, be, and the same is, hereby amended by amending the Zoning Map of the City of Mesquite so as to grant a conditional use designation for an indoor commercial recreation for coin-operated amusement machines within the Town East Mall with the stipulations that the operation is to be conducted as presented at the public hearing; otherwise the license would be withdrawn; other stipulations shall include that supervisors, age 25 years or older, approved by the Chief of Police, shall be on duty at all times, and that there shall be no sale or consumption of food or drink, and smoking and gambling shall not be allowed on the premises. . . .

vices in certain establishments.[4] The features of such establishments were defined in terms of Aladdin's own policy and rules. The exempted amusement centers should, *inter alia*, be located in an enclosed shopping mall and must not "offer for sale or allow the consumption of food, drink or other merchandise." Ordinance No. 1310. The zoning change, likewise, incorporated Aladdin's council presentation: "the operation is to be conducted as presented [by Aladdin's] at the public hearing." Ordinance No. 1314.

Following enactment of these ordinances, Aladdin's entered into a ten year lease with Homart at a monthly rental of $2,433.75.[5] Aladdin's expended an additional $80,000 preparing its property for business.

In July 1976, after Aladdin's had spent or committed this sum in reliance upon the agreed legislative changes and in anticipation of doing business, the city manager refused to approve Aladdin's license application. At the time, he

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[4] ORDINANCE NO. 1310

WHEREAS, certain patrons of major shopping centers desire to leave their children unattended at coin-operated amusement establishments while shopping; and

WHEREAS, coin-operated amusement establishments have been and will be constructed that will accommodate same;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MESQUITE, TEXAS:

SECTION 1. That Chapter 5-B, Section 7, of the City Code is hereby amended by adding the following, in all other respects to remain in full force and effect:

"Provided, however, that coin-operated establishments located in major shopping centers containing an enclosed mall and said establishments being operated only during the hours said mall is open and having no outside entrance and where said establishments does not offer for sale or allow the consumption of food, drink or other merchandise, the foregoing provision shall not be applicable and provided, further, that children under seven (7) must be accompanied by an adult."

[5] Aladdin's began paying rent to Homart, Inc., in July 1976, and, apparently, continues doing so.

refused to explain his decision. Aladdin's later discovered that the city manager denied its application relying on conclusions drawn by the police chief that Aladdin's parent company, Bally Manufacturing Company, was part of the "mafia." The police chief's conclusions were based on his department's inquiry, which revealed that Bally and its president had been the subject of a federal indictment in Louisiana on charges of participation in racketeering and gambling activities. The department's investigation also established that Bally and its president had been acquitted of all charges.

The city manager cited ordinance No. 1103, amended in other respects by ordinance No. 1310, as authority for denying Aladdin's license. Ordinance No. 1103 permits the chief of police to make recommendations concerning the licensing of coin-operated amusement centers on the basis, *inter alia*, of "the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude and *connections with criminal elements.*" Ordinance No. 1103 (emphasis added).[6] According to the chief and the city manager, Aladdin's possessed connections with

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[6] ORDINANCE NO. 1103

. . . . .

SECTION 2. It is hereby declared to be unlawful to own, operate or maintain a coin-operated amusement establishment in the City without a license issued by the City of Mesquite therefor.

. . . . .

Any person desiring to obtain a license for a coin-operated amusement establishment shall apply to the City Secretary by original and five (5) copies, one of which shall be routed to the City Manager, Chief of Police, Chief Building Inspector and City Planner, for review.

. . . . .

The Chief of Police shall make his recommendation based upon his investigation of the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude and connections with criminal elements, taking into consideration the attraction by such establishments of those of tender years.

criminal elements, specifically the mafia, through its parent, Bally.

After receiving notice of the city manager's action, Aladdin's appealed to the city council. On August 16, 1976, the council voted to affirm the city manager's decision.[7]

On September 10, 1976, Aladdin's sued for injunctive relief in state court. On January 14, 1977, following trial, the court ruled that ordinance No. 1103 was impermissibly vague, general and indefinite under both the due process clause of the fourteenth amendment of the federal constitution and article 1, section 19 of the Texas constitution. Further, Mesquite was found to have exceeded its powers under article 11, section 5 of the Texas constitution and articles 1165 and 1175 of the Texas Revised Civil Statutes because it used vague and overbroad language. The state court also held that no substantial evidence supported the denial of a license to Aladdin's. Indeed, it found that neither Bally nor Aladdin's had any connection with the mafia or criminal elements. The court then ordered the city to issue Aladdin's a license immediately. The city issued the license on January 14, after accepting the required $100 filing fee. On January 20, 1977, the city gave notice of appeal.[8]

Aladdin's once again prepared to commence business on February 5, 1977. On February 7, however, the city passed

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[7] After learning that its license application had been denied, Aladdin's moved its equipment from the Town East Mall to another location. This move, as well as the expense of retaining the manager it had previously hired, cost Aladdin's an additional $5,000.

[8] On appeal, the judgment of the district court was affirmed, *City of Mesquite v. Aladdin's Castle, Inc.*, 559 S.W.2d 92 (Tex.Civ. App. 1977), *writ ref'd n.r.e.* 570 S.W.2d 377 (Tex.1978).

ordinance No. 1353,[9] which repealed No. 1310 and Aladdin's exemption under the seventeen year old age restriction of ordinance No. 1103. Ordinance No. 1353 included a new definition of "connection with criminal elements."[10] The city council thus reenacted the age restriction it had previously eliminated at Aladdin's request. The earlier contacts between Aladdin's and the city council indicate that the council knew that this change would clearly make Aladdin's Mesquite center unprofitable and force it to close. In short, Mesquite achieved the result denied it by the state court judgment.

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[9] ORDINANCE NO. 1353

. . . . . .

SECTION 1. That Ordinance Number 1310 of the City of Mesquite passed on the 5th day of April, 1976, is hereby repealed.

. . . . . .

SECTION 5. It shall be unlawful for any owner, operator or displayer of coin-operated amusement machines to allow any person under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless such minor is accompanied by a parent or legal guardian.

[10] ORDINANCE NO. 1353

. . . . . .

Connection With Criminal Elements is defined as that state of affairs wherein an applicant, or an officer of, principal stockholder of, person having a substantial interest in or management responsibility for, a corporation or other organization wherein such organization is the applicant, directly or as parent, subsidiary or affiliate, has such association, acquaintance, or business association with parties having been convicted of a felony or crime involving moral turpitude or are otherwise involved in unlawful activities, whether convicted or not, to the extent that the fencing of stolen merchandise or illegally obtained funds, the procurring [sic] of prostitutes, the transfer or sale of narcotics or illegal substances is made more feasible or likely or the protection of those of tender years from such unwholesome influences are rendered more difficult.

A determination by the United States Department of Justice that a party is a member of the "mafia" or "Cosa Nostro" family or that such party is engaged in or affiliated with a nationwide crime organization, whether formally or informally, shall be prima facia [sic] evidence, so far as the issuance of a license hereunder, that such person has "connections with criminal elements" and constitute, within the meaning of this ordinance, "criminal elements".

Aladdin's then [11] sued in federal district court seeking injunctive relief to prohibit the city from enforcing ordinance No. 1353. Aladdin's asserted that the ordinance deprived it of various constitutional rights, including those of property and equal protection under both the federal and Texas constitutions. Aladdin's subsequently amended its complaint to include a challenge to the "connection with criminal elements" language, including the new definitional section added by ordinance No. 1353. Aladdin's especially contested the constitutionality of (1) the prohibition on the issuance of licenses for coin-operated amusement centers to anyone having a "connection with criminal elements," and (2) the age restriction on admission to such centers. On February 11, 1977, the court entered a temporary restraining order enjoining the ordinance's enforcement. After an evidentiary hearing, a preliminary injunction was entered on March 21, 1977. The case was then tried to the court on the merits. The court held that the language "connection with criminal elements," as amended by ordinance No. 1353, was unconstitutionally vague. It upheld the challenged age restriction, however, finding it to be rationally related to a legitimate state interest. *Aladdin's Castle, Inc. v. City of Mesquite,* 434 F.Supp. 473 (N.D.Tex.1977). Both parties appealed to this court.

II. PRELIMINARY MATTERS

A. *Subject Matter Jurisdiction*

The city challenges subject matter jurisdiction, claiming that the amount in controversy does not exceed $10,000. This contention misses the mark.

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[11] Aladdin's learned of the city's action reinstating the ordinance after the event, when a reporter called seeking its reaction. The city did, however, post a notice of consideration of the ordinance in its municipal building on February 4.

> In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation. . . . Here, that object is the right of [Aladdin's] . . . to conduct their business affairs . . . free from the interference of the challenged statute. The value of that right is measured by the losses that will follow from the statute's enforcement.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 347, 97 S.Ct. 2434, 2443, 53 L.Ed.2d 383 (1977) (citations omitted). Aladdin's claims that it would suffer a $23,680 annual loss under the age restriction and that it would enjoy a $20,000 annual profit without it. The district court properly found jurisdiction.[12]

B. *Aladdin's Standing*

Invoking *Laird v. Tatum*, 408 U.S. 1, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972), the city claims that Aladdin's lacks standing to bring a void for vagueness challenge against the "connections with criminal elements" language of ordinance No. 1353. It argues that Aladdin's has not been injured; rather, Aladdin's complaint arises "from [its] less gen-

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[12] Jurisdiction exists under 28 U.S.C. §§ 1331, 1332. The city does not dispute the existence of diversity. It does argue, however, that a federal question has not been presented. We note in this regard that *Murphy v. California*, 225 U.S. 623, 32 S.Ct. 697, 56 L.Ed. 1229 (1912) and similar cases, *e.g.*, *Phillips v. City of Atlanta*, 57 F.Supp. 588 (N.D.Ga.), *aff'd*, 145 F.2d 470 (5th Cir. 1944), are not authority for the proposition that a substantial federal question is never presented by any municipal regulation of a business conducting a public amusement. *Murphy* does not say that a federal question is not presented if a city decides to regulate by void laws, irrational laws or laws violative of substantive constitutional rights such as due process or taking. Aladdin's is not challenging the city's general police power to regulate local businesses to promote the general welfare. The issue, instead, is whether the city employed a constitutionally permissible means or trammeled fundamental rights under the constitutions or laws of the United States and Texas.

eralized yet speculative apprehensiveness that the [city] may at some future date misuse the information in some way that would cause direct harm to [Aladdin's]." *Id.* at 13, 92 S.Ct. at 2325 (footnote omitted). Aladdin's, it further asserts, does not complain that the city now refuses to issue it a license or that there will ever be a dispute involving the challenged language. *See Juidice v. Vail,* 430 U.S. 327, 331-33, 97 S.Ct. 1211, 1215-16, 51 L.Ed.2d 376 (1977).

This argument fails because it attempts to portray ordinance No. 1353 as a nonregulatory directive. In fact, the ordinance is regulatory and proscriptive. To obtain a license or to renew one, an applicant must seek the consent of five parties, including the chief of police. The chief's decision whether to give a positive or negative recommendation must, among other things, turn on the results of his investigation into "connections with criminal elements." Ordinance No. 1353 forces Aladdin's to attempt to conform its conduct to a vague standard in its license renewal applications for at least ten years or to suffer substantial pecuniary loss under its lease and in its investment in its leasehold. Aladdin's, therefore, has standing to challenge the "connections with criminal elements" language on vagueness grounds. *Laird v. Tatum,* 408 U.S. at 11, 92 S.Ct. at 2324 (plaintiff would have had standing if he "was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging").

Aladdin's also has standing to invoke the rights of various third parties.

> In this case, . . . the statute . . . inflicts on the vendor [Aladdin's] "injury in fact" that satisfies Art. III's case-or-controversy requirement, since "[t]he legal duties created by the statutory sections under challenge are addressed directly to vendors such as [[Aladdin's]. It] is obliged either to heed the statutory [prohibition], thereby

> incurring a direct economic injury through the constriction of [its] market, or to disobey the statutory command and suffer" legal sanctions. . . . Therefore, [Aladdin's] is among the "vendors and those in like positions [who] have been uniformly permitted to resist efforts at restricting their operations by acting as advocates for the rights of third parties who seek access to their market or function." . . . As such, [Aladdin's] "is entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should [its] constitutional challenge fail."

Carey v. Population Services International, 431 U.S. 678, 683-84, 97 S.Ct. 2010, 2015, 52 L.Ed.2d 675 (1977) (citations omitted).

C. *Abstention*

Mesquite urges us to abstain because the vagueness issue was pending in state court when Aladdin's instituted its federal action. The city fails to recognize first, that Aladdin's originally brought its federal action to challenge Mesquite's seventeen year old restriction. This provision in the present ordinance was not before the state court because it was not adopted by the city until after it had lost on other grounds in state court. Second, the vagueness issue presented to the state court was different from the one presented to this court. Mesquite had passed the second "connection with criminal elements" ordinance with the new definitional section only after the state court invalidated its first ordinance. In the federal suit, Aladdin's challenged the constitutionality of legislation enacted after the state court proceedings commenced. Because no state proceeding based on this new legislation is pending, *see Doran v. Salem Inn, Inc.*, 422 U.S. 922, 930, 95 S.Ct. 2561, 2567, 45 L.Ed.2d 648 (1975), and because Aladdin's need not initiate another state proceeding which might provide a

remedy, *see Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 509 — 10, 92 S.Ct. 1749, 1756 — 57, 32 L.Ed. 257 (1972), abstention is inappropriate. *See Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646, 650 (5th Cir. 1978).

D. *Abuse of Discretion*

Mesquite claims that the district court abused its discretion in allowing Aladdin's to file its supplemental complaint raising the vagueness and overbreadth challenges. Mesquite contends that the court's decision put it in the position of going to trial unprepared or of allowing the preliminary injunction to remain in effect.

The district court has wide discretion over supplemental filings. Fed.R.Civ.P. 15(a). Mesquite could have requested a continuance to avoid prejudice. In any event, we find that the trial court did not abuse its discretion in permitting Aladdin's to amend its pleadings. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330, 91 S.Ct. 795, 802, 28 L.Ed.2d 77 (1971); *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962).

III. SUBSTANTIVE MATTERS

A. *Vagueness: "Connection with Criminal Elements"*

We agree with the district court that ordinance No. 1353's language, "connection with criminal elements," coupled with its definitional section and legislative policy section, *see* note 10 *supra*, is void for vagueness under the due process clause of the fourteenth amendment.

A law is void for vagueness if persons "of common intelligence must necessarily guess at its meaning and differ as to its application . . .." *Smith v. Goguen*, 415 U.S. 566, 572 n.8, 94 S.Ct. 1242, 1246 n.8, 39 L.Ed.2d 605 (1974) quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). *See generally* Note, *The*

Void-for-Vagueness Doctrine in the Supreme Court, 109 U.Pa.L. Rev. 67 (1960). The offense to due process lies in both the nature and consequences of vagueness. First, vague laws do not give individuals fair notice of the conduct proscribed. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972). *Accord Grayned v. City of Rockford*, 408 U.S. 104, 108 & n.3, 92 S.Ct. 2294, 2298 & n.3, 33 L.Ed.2d 222 (1972). Second, vague laws do not limit the exercise of discretion by law enforcement officials; thus they engender the possibility of arbitrary and discriminatory enforcement. *Grayned v. City of Rockford*, 408 U.S. at 108-09 & n.4, 92 S.Ct. at 2298-99 & n. 4; *Papachristou v. City of Jacksonville*, 405 U.S. at 168-70, 92 S.Ct. at 846-47. Third, vague laws defeat the intrinsic promise of, and frustrate the essence of, a constitutional regime. We remain "a government of laws, and not of men," *Marbury v. Madison*, 5 U.S. (1 Cranch.) 137, 163, 2 L.Ed. 60 (1803) only so long as our laws remain clear.

The definition of "connection with criminal elements" in section 9 of ordinance No. 1353 does not remedy the vagueness correctly found to exist by the state court. It refers to an "association, acquaintance, or business association" with undesirable parties "to the extent" that certain prohibited activities are made more likely "or the protection of those of tender years from such unwholesome influences are rendered more difficult." The nature of the improper associations or acquaintances is unspecified. Nor is it explained how an individual is to measure the extent to which these relationships might render protection of the young more difficult, or what degrees of "extent" and likelihood are barred. The ordinance fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. at 108, 92 S.Ct. at 2298. In *Lanzetta v. New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83

L.Ed. 888 (1939), the Supreme Court struck down as unconstitutionally vague a statute applying to "a member of any gang." The present ordinance is equally vague and uncertain, and we hold that it violates due process.[13]

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[13] A law is void on its face for overbreadth if it "does not aim specifically at evils within the allowable area of [government] control but, . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise" of protected expressive or associational rights. *Thornhill v. Alabama*, 310 U.S. 88, 97, 60 S.Ct. 736, 741, 84 L.Ed. 1093 (1940). Under ordinance No. 1353, a license may be denied if an individual engaging in "apparently innocent activity" happens to associate with the wrong sort of person. *Sawyer v. Sandstrom*, 615 F.2d 311, 316 (5th Cir. 1980). In *Sawyer* we held that the "right to freely associate is not limited to those associations which are 'political in the customary sense' but includes those which 'pertain to the social, legal, and economic benefit of the [individuals who are associating].' *Griswold v. Connecticut*, 381 U.S. 479, 483, 85 S.Ct. 1678, 1681, 14 L.Ed.2d 510 (1965)." *Id.* Ordinance No. 1353 clearly and substantially attaches very serious consequences to, and seeks to deter, the exercise of protected associational activity. It is, therefore, overbroad and repugnant to due process. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276, 45 L.Ed.2d 125 (1975). *See generally Broadrick v. Oklahoma*, 413 U.S. 601, 612-13, 93 S.Ct. 2908, 2915-16, 37 L.Ed. 2d 830 (1973); *Thornhill v. Alabama*, 310 U.S. at 97-98, 60 S.Ct. at 741-42.

Even if ordinance No. 1353 has a legitimate purpose, the ordinance fails because less drastic alternative means of accomplishing that purpose exist. *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960). The alleged purpose of ordinance No. 1353 is to ensure "that proper and suitable" persons operate amusement centers so as to protect children from "those who would promote gambling, sale of narcotics and other unlawful activities." Ordinance No. 1353. This purpose could also be achieved by narrowly drawn rules regulating nonassociational conduct. *Sawyer v. Sandstrom*, 615 F.2d at 317-18.

The section of the ordinance using identification by the Department of Justice as a test for "criminal elements" raises additional due process problems. Use of identification by the Attorney General as a test for Communist-front organization was struck down in *Dombrowski v. Pfister*, 380 U.S. 479, 494-96, 85 S.Ct. 1116, 1125-26, 14 L.Ed.2d 22 (1965), since there was no requirement that the organization be so identified only after compliance with proper procedural safeguards. The present Mesquite ordinance is equally lacking.

B. *The Age Requirement*

The district court reviewed the age requirement of ordinance No. 1353 for constitutional purposes on a rational basis test. It noted that the facts of this case revealed only that:

> young people congregate at such amusement establishments, that several truancy arrests have been made at such centers (none at Plaintiff's establishment), and that in one instance a juvenile arrested for truancy at an amusement center was later found to be participating in the free school lunch program.

434 F.Supp. at 477. Observing that these were "incredibly slender reeds upon which to base [this] ordinance," *id.*, the court nevertheless upheld it. We cannot say with the district court that the ordinance's rational basis is "incredibly slender." Rather, the ordinance is "arbitrary and irrational." *Lindsey v. Normet*, 405 U.S. 56, 79, 92 S.Ct. 862, 877, 31 L.Ed.2d 36 (1972). We hold that the seventeen year old age requirement violates both the United States and Texas constitutional guarantees of due process of law,[14] and that the application of this age requirement to coin-operated amusement centers violates the federal and Texas constitutional guarantees of equal protection of the law.[15]

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[14] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. Const. amend. XIV, § 1. "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Tex. Const. art. I, § 19.

[15] "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S.Const. amend. XIV, § 1. "All free men, when they form a social compact, have equal rights . . ." Tex.Const. art. I, § 3.

1. *Rational Basis*

Assuming that the rational basis test is the appropriate standard of review, we conclude that no such rationality supports ordinance No. 1353. The test requires that legislative action be rationally related to the accomplishment of a legitimate state purpose. First, the challenged legislation must have a legitimate public purpose based on promotion of the public welfare, health or safety. *See, e.g., Rinaldi v. Yeager,* 384 U.S. 305, 309-10, 86 S.Ct. 1497, 1499-1500, 16 L.Ed.2d 577 (1966); *Falfurrias Creamery Co. v. City of Laredo,* 276 S.W.2d 351 (Tex.Civ.App.1955, writ ref'd n. r.e.). Second, the act taken must bear a rational relation to the end it seeks to further. *See, e.g., Griswold v. Connecticut,* 381 U.S. at 505-07, 85 S.Ct. at 1693-94 (White, J., concurring); *Schware v. Board of Bar Examiners,* 353 U.S. 232, 239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957); *City of University Park v. Benners,* 485 S.W.2d 773, 778-79 (Tex. 1972), *appeal dismissed* 411 U.S. 901, 93 S.Ct. 1530, 36 L.Ed.2d 191 (1973).

The requirement of legislative rationality in the service of legitimate purposes protects individuals and their liberties from official arbitrariness or unthinking prejudice. As one commentator noted, irrationality at least means "patently useless in the service of any goal apart from whim or favoritism." Michelman, *Politics and Values or What's Really Wrong with Rationality Review?* 13 Creighton Law Review 487, 499 (1979). The test requires that legislation constitute a means that is "reasonable, not arbitrary and rests 'upon some ground of difference having a fair and substantial relation to the object of the legislation . . . .'" *Texas Woman's University v. Chayklintaste,* 530 S.W.2d 927, 928 (Tex. 1979), citing *Reed v. Reed,* 404 U.S. 71, 76, 92 S.Ct. 251, 254, 30 L.Ed.2d 225 (1971). *Accord, United States Department of Agriculture v. Moreno,* 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); *James v. Strange,* 407 U.S. 128, 92 S.Ct. 2027, 32 L.Ed.2d 600 (1972); *Jackson v.*

Indiana, 406 U.S. 715, 92 S.Ct. 1845, 32 L.Ed.2d 435 (1972); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972); *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

Examination of ordinance No. 1353 reveals two stated purposes. First, the ordinance seeks to prevent truancy. Second, it seeks to keep minors from being exposed to people "who would promote gambling, sale of narcotics and other unlawful activities." We conclude that the seventeen year old requirement in no way rationally furthers these interests in regulating the associational activity of Mesquite's young citizens, even making the assumption that both of these goals are legitimate.

(a) *Truancy*

The decision to bar all people under seventeen years of age, whether or not they are required to be in a school, Tex.Educ. Code Ann. §§ 21.032, 21.033 (Vernon) (1972 & Supp.1980), from all coin-operated amusement centers at all times is patently irrational. *See, e.g., Stanley v. Illinois*, 405 U.S. at 652-59, 92 S.Ct. at 1213-1216. Barring young people from using coin-operated amusement devices at times and on days when school is closed simply bears no relation whatever to the city's alleged interest in eliminating truancy. *See Eisenstadt v. Baird*, 405 U.S. at 447-52, 92 S.Ct. at 1035-1037 (contrived purpose evidenced by irrationality). The regulation instead evidences the city's disapproval of such centers in general or of Aladdin's owners in particular. *See Orr v. Orr*. 440 U.S. 268, 280 n.10, 99 S.Ct. 1102, 1112 n.10, 59 L.Ed.2d 306 (1979). Such disapproval may justify private action, such as the withholding of patronage, but mere disapproval is not enough constitutionally to justify bringing the full weight of the municipality's regulatory apparatus into play.

By the same token, the regulation denies Aladdin's equal protection of the laws. Just as the "all hours" restriction is grossly overinclusive, the limitation of that restriction to coin-operated amusement centers is equally underinclusive. Before such centers existed, children found places and opportunities for truancy, and they would find places were such centers to become extinct. Singling out coin-operated amusement centers from all other establishments is an act of discrimination, not policy.

> Traditional equal protection analysis does not require that every classification be drawn with precise " 'mathematical nicety.' " . . . But the classification here in issue is not only "imprecise," it is wholly without any rational basis.

United States Department of Agriculture v. Moreno, 413 U.S. at 538, 93 S.Ct. at 2827 (citation omitted).

(b) *Exposure to Corrupting Influences*

The record is entirely devoid of evidence that a person under seventeen years of age has been exposed to a person "who would promote gambling, [the] sale of narcotics and other unlawful activities" while in a coin-operated amusement center in Mesquite. The district court recognized, as we do, that the city presented no evidence that such people ever come to these centers. Initially, therefore, we note that the city failed to demonstrate any need which would give rise to an interest in protecting its young citizens from corrupt influences in amusement centers.

If such people do go to the centers, there is no evidence that they are drawn by the machines. They are instead drawn by the presence of those whom they perceive of as potential victims. The city did not show that barring children from these centers would in any way stop these people from associating with children. Logic indicates that they would merely follow the barred children to other places of

congregation such as the schoolyard, the nearby street corner, the movies, the local fast food establishment, the parking lot, the concert, the park, or the beach. The city's regulation thus does not even further its stated goal of protecting minors from exposure to malefactors. *Cf., Eisenstadt v. Baird*, 405 U.S. at 442 n.3, 92 S.Ct. at 1033 n.3 (legislation "has no deterrent effect"). Mesquite's goal of keeping minors from being exposed to undesirable people could not, therefore, be served by an absolute ban on access to coin-operated amusement centers, unless such a ban were accompanied by bans on access to every other place of congregation. Certainly such an approach would impermissibly destroy freedom. If a malefactor is to be precluded from malefaction, the city must bar the act or must seek to educate potential victims and perpetrators. *Whitney v. California*, 274 U.S. 357, 378, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). Barring association in places, on the other hand, does not permissibly further an end of precluding conduct which might occur in those places. *Cf. Medora v. Colautti*, 602 F.2d 1149, 1155 n.14 (3d Cir. 1979) ("Just as the intentional harming of a group is not a legitimate goal, so too the intentional harming of a group to further some other governmental interest is not a rational means to further that other interest"). A grossly overinclusive and irrational ban will not pass constitutional muster. *F. S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561, 64 L.Ed. 989 (1920). As the city must acknowledge, the supposed evil does not inhere in mere simultaneous presence.[16]

[16] Mesquite relies on *Murphy v. California*, 225 U.S. 623, 32 S.Ct. 697, 56 L.Ed. 1229 (1912), as authority for the proposition that municipalities are much less restrained by the constitution when they regulate public amusements than when they regulate ordinary businesses. This aspect of *Murphy*, however, is no longer good law. *Murphy* rested its distinction on the theory that "the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort [for amusement] . . . ." *id.* at 629,

2. *Strict Scrutiny*

Even if the challenged ordinance had a rational basis and a legitimate purpose, we would nevertheless be compelled to strike it down. The challenged age restriction impermissibly trammels fundamental personal rights. By its actions, Mesquite has denied individuals under seventeen years of age their liberty interests in association. Since this denial neither furthers "a sufficiently important interest [nor] employs means closely drawn to avoid unnecessary abridgement of associational freedoms," *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 637, 46 L.Ed.2d 659 (1976), the ordinance is unconstitutional.

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32 S.Ct. at 698. This view of idleness has been rejected by the Supreme Court:

> All loitering, loafing, or idling . . . is not necessarily detrimental to the public welfare . . . . It may be and often is entirely innocuous.

Papachristou v. City of Jacksonville, 405 U.S. 156, 157 n.2, 92 S.Ct. 839, 841 n.2, 31 L.Ed.2d 110 (1972) (quoting *Lazarus v. Faircloth*, 301 F.Supp. 266, 272 (S.D.Fla. 1969)); *see generally Coates v. City of Cincinnati*, 402 U.S. 611, 615-16, 91 S.Ct. 1686, 1689, 29 L.Ed.2d 214 (1971). Today, *Murphy* stands only for the proposition that

> The States have the power to make a morally neutral judgment that [some activity] has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize, in Mr. Chief Justice Warren's words, the States' "right . . . to maintain a decent society." *Jacobellis v. Ohio*, 378 U.S. [184] at 199, 84 S.Ct. 1676 at 1684, 12 L.Ed.2d 793 [1964] (dissenting opinion).

Paris Adult Theatre I v. Slaton, 413 U.S. 49, 69, 93 S.Ct. 2628, 2641, 37 L.Ed.2d 446 (1973). As we have already shown, Mesquite's ordinance is simply not rationally related to this legitimate purpose. Even *Murphy* rejects ordinances when

> looking through mere forms and at the substance of the matter, . . . the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.

Murphy v. California, 225 U.S. at 630, 32 S.Ct. at 699 (citation omitted).

(a) *Association*

The right of association is fundamental. *See, e. g., Richmond Newspapers Inc. v. Virginia,* —— U.S. ——, ——, 100 S.Ct. 2814, 2829, 65 L.Ed.2d 973 (1980) (plurality opinion); *NAACP v. Button,* 371 U.S. 415, 430, 83 S.Ct. 328, 336, 9 L.Ed.2d 405 (1963); *Sotto v. Wainwright,* 601 F.2d 184, 191 (5th Cir. 1979), *cert. denied,* 445 U.S. 950, 100 S.Ct. 1597, 63 L.Ed.2d 784 (1980). The right to associate freely and "'to go where one pleases'" is a protected freedom under the first amendment and a substantive guarantee of fourteenth amendment due process. *Sawyer v. Sandstrom,* 615 F.2d at 316 (quoting *Bykofsky v. Borough of Middletown,* 401 F.Supp. 1242, 1254 (M.D.Pa.1975), *aff'd,* 535 F.2d 1245 (3rd Cir.), *cert. denied,* 429 U.S. 964, 97 S.Ct. 394, 50 L.Ed.2d 333 (1976)); *see Sotto v. Wainwright,* 601 F.2d at 190-91. The right of free association protects associational activities directed at a plethora of ends, *Griswold v. Connecticut,* 381 U.S. at 483, 85 S.Ct. at 1681; *Sawyer v. Sandstrom,* 615 F.2d at 316, including political, *e. g., Buckley v. Valeo,* 424 U.S. at 22, 96 S.Ct. at 636, economic, *UMW v. Illinois State Bar Association,* 389 U.S. 217, 221-25, 88 S.Ct. 353, 355-57, 19 L.Ed.2d 426 (1967), familial, *e. g., Moore v. City of East Cleveland,* 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion), intimate, *e. g., Griswold v. Connecticut,* 381 U.S. at 486, 85 S.Ct. at 1682; see Karst, *The Freedom of Intimate Association,* 89 Yale L.J. 624 (1980); *see generally* Raggi, *An Independent Right to Freedom of Association,* 12 Harv.C.R.-C.L. L.Rev. 1 (1977). The Supreme Court has never ruled directly on the application of the right of association in a social context such as the present one. However, the Court in dicta has endorsed a right of social association, *Gilmore v. City of Montgomery,* 417 U.S. 556, 575, 94 S.Ct. 2416, 2427, 41 L.Ed.2d 304 (1974) (quoting *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163, 179-80, 92 S.Ct. 1965, 1974, 32 L.Ed.2d

627 (1972) (Douglas, J., dissenting)), and this circuit has held that even associating on street corners is "constitutionally protected conduct," *Sawyer v. Sandstrom*, 615 F.2d at 317; *cf. Robinson v. Reed*, 566 F.2d 911, 913 (5th Cir. 1978) (public employee could make constitutional claim if required to disclose facts about home life or associations). These precedents control the present case.

Restraining association is therefore not a legitimate governmental purpose, absent a compelling state interest to warrant such restraint. Regulations affecting fundamental rights of association, but aimed at nonassociational evils, are allowable under certain circumstances. To be constitutional, however, the regulation must at least be nondiscriminatory, must not "unnecessarily burden or restrict constitutionally protected activity," *Dunn v. Blumstein*, 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274 (1972), must be drawn with "[p]recision," *NAACP v. Button*, 371 U.S. at 438, 83 S.Ct. at 340, must be "tailored," *Shapiro v. Thompson*, 394 U.S. 618, 631, 89 S.Ct. 1322, 1329, 22 L.Ed.2d 600 (1969), to accomplish its legitimate objectives, and must not be the most restrictive method of regulation if other, "less drastic means" are available, *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960).

(b) *Regulation of Minors*

We do not doubt that the state may have a legitimate interest in protecting young people from certain unhealthy influences. Yet "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP v. Alabama*, 377 U.S. 288, 307, 84 S.Ct. 1302, 1313, 12 L.Ed.2d 325 (1964); *Sawyer v. Sandstrom*, 615 F.2d at 316 (association as one such protected freedom).

Mesquite's interest in shielding young people from undesirable influences may be achieved in other ways. Activities such as gambling with children or selling them drugs can be criminalized and vigorously prosecuted.[17] The ordinance before us, however, sweeps too broadly and cannot be justified under our Constitution. "[T]he deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgement of the rights of free speech and assembly." *Whitney v. California*, 274 U.S. 357, 378, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1927) Brandeis, J., concurring).

The standard that the ordinance must meet is not reduced because minors are involved. "A child, merely on account of his minority, is not beyond the protection of the Constitution." *Bellotti v. Baird* 443 U.S. 622, 633, 99 S.Ct. 3035, 3043, 61 L.Ed.2d 797 (1979) (Powell, J., joined by Burger, C. J. & Stewart & Rehnquist, J.J.). Minors "are possessed of fundamental rights which the State must respect." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 511, 89 S.Ct. 733, 739, 21 L.Ed.2d 731 (1969). "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 13, 87 S.Ct. 1428, 1436, 18 L.Ed.2d 527 (1967). *Accord, Planned Parenthood v. Danforth*, 428 U.S. 52, 74, 96 S.Ct. 2831, 2843, 49 L.Ed.2d 788 (1976). *See generally Developments in the Law — The Constitution and the Family*, 93 Harv.L. Rev. 1156, 1358-77 (1980).

In some cases to be sure, the state may have greater power to regulate conduct that is otherwise constitutionally protected if the regulation applies only to children. This "somewhat broader authority to regulate the activities of children than adults," *Planned Parenthood v. Danforth*,

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[17] We do not intimate by our holding that Mesquite cannot appropriately restrict minors in connection with establishments which dispense alcoholic beverages or illicit drugs.

428 U.S. at 74, 96 S.Ct. at 2843, is warranted only if a special circumstance of youth creates a unique danger to minors which presents the state with an interest in regulating their activities that does not exist in the case of adults. *Ginsberg v. New York*, 390 U.S. 629, 638-41, 88 S.Ct. 1274, 1279-81, 20 L.Ed.2d 195 (1968); *Prince v. Massachusetts*, 321 U.S. 158, 169-70, 64 S.Ct. 438, 443-444, 88 L.Ed. 645 (1944). Control and restraint by the state, which would otherwise be intolerable under our Constitution may be justified if the regulation serves a "'significant state interest . . . that is not present in the case of an adult,'" which arises from the fact of youthful vulnerability to harm. *Carey v. Population Services International*, 431 U.S. 678, 693, 97 S.Ct. 2010, 2020, 52 L.Ed.2d 675 (1977) citing *Planned Parenthood v. Danforth*, 428 U.S. at 75, 96 S.Ct. at 2843).

In *Bellotti v. Baird*, 443 U.S. at 633-39, 99 S.Ct. at 3035-46, Justice Powell set out for himself and three other Justices three reasons which in some circumstances might permit the state to restrain minors in a way which would be unconstitutional if applied to adults:

> the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child-rearing.

Id. at 634, 99 S.Ct. at 3043. These reasons may be viewed as threshold criteria. If Mesquite's ordinance were based on any of them, we would be required to determine the strength of the support provided, its relation to the ordinance as a whole, and the extent, if any, to which it might serve to justify any special restraints on the associational rights of minors. Neither the Supreme Court nor this circuit has set forth the appropriate standards under which such an inquiry would be conducted. We need not undertake to

resolve this matter here, since none of Justice Powell's factors even remotely apply to the present ordinance.

There is no issue of special vulnerability presented in this case. Justice Powell limited his discussion of this factor to juvenile criminal proceedings, where the special needs of children have served as a basis for distinguishing certain aspects of procedural due process from adult cases. *Compare In re Gault*, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) *with McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971). Even extending the vulnerability rationale to its broadest extent, it is impossible to conclude that a coin-operated amusement device presents a physical, mental, or moral threat under which "the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention,'" *Bellotti v. Baird*, 443 U.S. at 635, 99 S.Ct. at 3044, citing *McKeiver v. Pennsylvania*, 403 U.S. at 550, 91 S.Ct. at 1988 (plurality opinion). That Mesquite may disapprove of Aladdin's Castle is hardly a sufficient justification for invoking "the peculiar vulnerability of children." Associations "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14, 95 S.Ct. 2268, 2274-75, 45 L.Ed.2d 125 (1975).

The irrelevance of the "critical decision" rationale is manifest on its face. To suggest that minors be permitted to express their views on divisive public issues, *Tinker v. Des Moines Independent School District*, and to secure abortions without parental consent, *Bellotti v. Baird*, *Planned Parenthood v. Danforth*, but that they can be barred from making the "critical decision" of whether or not to deposit a quarter in a coin-operated amusement devise is not a proposition that deserves serious consideration.

As for Justice Powell's third element, the role of parents, clearly this concern militates against the ordinance, not for it. Even if youthfulness is relevant in the case before us, parents, not the state, should decide whether their children are to enter coin-operated amusement centers. The state may not burden parents who decide to allow their children to enter the centers by requiring these parents to accompany their children. If a parent would rather shop or work and decides to trust Aladdin's personnel or the child, that is the parent's prerogative.

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.

Wisconsin v. Yoder, 406 U.S. 205, 232, 92 S.Ct. 1526, 1541, 32 L.Ed.2d 15 (1972). *Accord, Parham v. J.R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 2504, 61 L.Ed.2d 101 (1979). Thus for minors as for adults, the ordinance impermissibly and unconstitutionally infringes on freedom of association.

3. *Concluding Remarks*

Aside from the constitutional issues we have already considered, we note that the record before us presents a very unpleasant story. We suggest, although we do not decide, that there are limits on the powers of municipalities to induce businessmen to expend vast sums of money, then, without any changed circumstances, to enact legislation which destroys the value of that expenditure. This is especially true if (1) the business, acting in good faith and with full disclosure, informs the municipality of its plans, (2) the municipality encourages the business in a significant manner, such as by amending existing legislation, (3) the business detrimentally relies on that encouragement, and

(4) no conditions, including the composition of the city council and the local political climate, have changed. In this case, Aladdin's knew that it was not guaranteed a license, but Aladdin's could not know that the city would reinstate its age restriction immediately after Aladdin's had undertaken substantial expenditures and contractual commitments. Aladdin's could only anticipate enforcement of the "connection with criminal elements" provision. Given our disposition of this case on other grounds, we need not decide whether Mesquite's actions exceed any constitutional restraint such as takings, contract impairments or due process. We should not, however, be understood as expressing tacit approval of Mesquite's actions in this matter.

Our dissatisfaction with this situation, however, extends beyond the specific incidents of this case to the entire approach to governmental regulation of personal liberty of which Mesquite's ordinance is but a sample. We certainly have no wish to challenge the legitimacy of many, even most of the statutes, ordinances and regulations issued by the innumerable legislatures and agencies in our modern and complex society. The era of *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905), is happily long ended. Nevertheless, recognition of the multiple problems and needs of our contemporary world does not oblige us to discard the basic principles of constitutional government to which we have always been committed.

> The purpose of the Constitution and Bill of Rights . . . was to take government off the backs of people . . . . This is the philosophy of Jefferson that "[t]he opinions of men are not the object of civil government, nor under its jurisdiction . . . . [I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order . . . ."

Schneider v. Smith, 390 U.S. 17, 25, 88 S.Ct. 682, 686, 19 L.Ed.2d 799 (1968) (quoting *A Bill for Establishing Religious Freedom*, Jeffersonian Cyclopedia 976 (1900)).

The original documents on which our law is based contain stated concerns about the necessary diffusion of power-separating, dividing and checking governmental powers. The framers created limits on government and, concomitantly, a realm within which individuals and groups could function with autonomy. This realm need not have been defined exhaustively by specific guarantees; its parameters were defined indirectly by the constraints placed on government and the recognition that these rights were to be available to all equally. Over time we have recognized that governmental power must not be too diffuse, but we have also seen that the changes mandated by this recognition need not stand at odds with our constitutional commitment to personal autonomy, if we merely articulate what is implicit in our law.

As Chief Justice Burger has recently reminded us,

> [C]ertain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be presumed innocent and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees. . . . [F]undamental rights, even though not expressly guaranteed, have been recognized . . . as indispensable to the enjoyment of rights explicitly defined.

Richmond Newspapers, Inc. v. Virginia, —— U.S. at ——, 100 S.Ct. at 2829 (Burger, C. J., plurality opinion joined by

Stevens & White, JJ.) (footnotes omitted). We have reached a similar conclusion on numerous occasions. *See e.g., Sotto v. Wainwright*, 601 F.2d 184, 190-91 (5th Cir. 1979), *cert. denied*, —— U.S. ——, 100 S.Ct. 1597, 63 L.Ed.2d 784 (1980); *St. Ann v. Palisi*, 495 F.2d 423, 425 (5th Cir. 1974). Doctrinally, this recognition of fundamental liberties derives in part from the ninth amendment, *Richmond Newspapers, Inc. v. Virginia*, —— U.S. at —— n.15, 100 S.Ct. at 2829 n.15 (plurality opinion); *Stanley v. Illinois*, 405 U.S. at 651, 92 S.Ct. at 1212; *Griswold v. Connecticut*, 381 U.S. at 488-93, 85 S.Ct. at 1683-84 (Goldberg, J., concurring, joined by Warren, C. J. & Brennan, J.), in part by due process, *Moore v. City of East Cleveland*, 431 U.S. 494, 501-03, 97 S.Ct. 1932, 1936-37, 52 L.Ed.2d 531 (1977) (plurality opinion); *Meachum v. Fano*, 427 U.S. 215, 230, 96 S.Ct. 2532, 2541, 49 L.Ed.2d 451 (1976) (Stevens, J., dissenting); *Griswold v. Connecticut*, 381 U.S. at 501, 85 S.Ct. at 1690 (Harlan, J., concurring), and in part from the basic principles of our system, *Richmond Newspapers, Inc. v. Virginia*, —— U.S. at ——, 100 S.Ct. at 2828-29 (plurality opinion); *Nevada v. Hall*, 440 U.S. 410, 432-34, 99 S.Ct. 1182, 1194-95, 59 L.Ed.2d 416 (1979) (Rehnquist, J., dissenting); *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 102-03, 93 S.Ct. 1278, 1332, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting). Whatever the source, all go to support "[t]he fundamental theory of liberty upon which all governments in this Union repose." *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925).

Liberty must be examined as a principle or cimmitment, if we are to avoid "the tyranny of labels," which Mr. Justice Cardozo characterized as "[a] fertile source of perversion in constitutional theory." *Snyder v. Massachusetts*, 291 U.S. 97, 114, 54 S.Ct. 330, 335, 78 L.Ed. 674 (1934). *Accord, Doe v. Bolton*, 410 U.S. 179, 210-11, 93 S.Ct. 739, 757, 35

L.Ed.2d 201 (1973) (Douglas, J., concurring) (the specific liberty interests found implicit in the liberty guaranteed by the fifth and fourteenth amendments elaborate "the Blessings of Liberty" promised in the Constitution's preamble). Liberty stands for the idea that the government exists to serve the individual, not that the individual exists to be subservient to the government or to a majority that controls government. The idea of liberty rejects governmental regimentation encompassing virtually every facet of the citizen's life. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943). Our governmental system is "built upon postulates of respect for the liberty of the individual." *Poe v. Ullman*, 367 U.S. 497, 542, 81 S.Ct. 1752, 1776, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). *See, e.g., Moore v. City of East Cleveland*, 431 U.S. at 503, 97 S.Ct. at 1937 (Powell, J., plurality opinion).

> "[L]iberty" . . . is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.

Bolling v. Sharpe, 347 U.S. 497, 499-500, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954).

That we are dealing with minors here does not alter our conclusions.

> In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relationship between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that

> any Legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution.

Meyer v. Nebraska, 262 U.S. 390, 402, 43 S.Ct. 625, 627, 67 L.Ed. 1042 (1923).

It is not the courts alone who are bound to safeguard these freedoms. Executives and legislature, from the nation's capital to the smallest village, and most of all the people themselves, are called upon by our Constitution to respect, enforce and cherish these principles of liberty and personal autonomy.

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They know that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, *the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.*

Olmstead v. United States, 277 U.S. 438, 478, 48 S.Ct. 564, 572, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting) (emphasis added).

In summary, we affirm the district court's holdings that jurisdiction exists, and that the portion of ordinance 1353 using and defining the term "connection with criminal elements" is void for vagueness. On the seventeen year old age requirement of the ordinance, we reverse, holding that it is constitutionally offensive and that plaintiff is entitled to the injunctive relief sought. We remand in order that the district court may modify its judgment to that effect.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

ALADDIN'S CASTLE, INC.

v.

The CITY OF MESQUITE.

No. CA 3-77-0194-C.

United States District Court,
N. D. Texas,
Dallas Division.

June 29, 1977.

MEMORANDUM OPINION

WILLIAM M. TAYLOR, Jr., District Judge.

Aladdin's Castle, Inc. (hereafter, A.C.I.), a corporation engaged in the business of owning and managing coin-operated amusement centers in various sections of the nation, brought this action seeking declaratory and injunctive relief from the enforcement of an allegedly unconstitutional ordinance of the City of Mesquite which (1) prohibits issuance of a license for a coin-operated amusement center to anyone having a "connection with criminal elements," and (2) restricts admission to coin-operated amusement centers to individuals age 17 or above. On February 11, 1977, this Court entered a temporary restraining order enjoining enforcement of such ordinance. After an evidentiary hearing, a preliminary injunction was entered on March 21, 1977. On June 10, 1977, the case was tried to the Court on the merits. For the reasons set forth below, this Court is of the opinion that those provisions of the ordinance purporting to deny a license to applicants who have a "connection with criminal elements" are unconstitutionally vague and overbroad. We are unable to say, however, that the challenged age restriction raises any Federal constitutional issue.

This action arises from the on-again, off-again legislative activity of the Mesquite City Council. In 1973, the Council enacted Ordinance No. 1103 which required licenses for coin-operated amusement establishments and limited access to such establishments to individuals 17 years of age or above. Individuals under age 17 were permitted access only if accompanied by parent or guardian. In 1976, A.C.I., through its president, approached officials of the City with respect to its interest in opening an amusement center at the Town East Mall within the city limits of Mesquite. A.C.I. owns and operates approximately one hundred other amusement centers at major shopping malls in metropolitan centers throughout the nation and has, as its mode of operation, the practice of keeping an adult manager on duty at all times in its stores to enforce its rules against gambling, smoking, and consumption of food and beverages on the premises. Apparently in consideration of the fact that A.C.I. operates what might be called a "high-class" amusement establishment and that A.C.I.'s president expressed a disinclination to open an amusement center at Town East Mall because of the age restriction, the Mesquite City Council, on April 5, 1976, enacted two ordinances to make operation of an amusement center at Town East more attractive to Plaintiff.

The April 5, 1976, ordinances first amended the Comprehensive Zoning Ordinance of Mesquite to authorize establishment of a coin-operated amusement center at Town East Mall; and second, amended the 1973 amusement center ordinance by exempting from the 17-year-old age restriction those:

"coin-operated establishments located in major shopping centers containing an enclosed mall and said establishments being operated only during the hours said mall is open and having no outside entrance and where said

establishment does not offer for sale or allow the consumption of food, drink or other merchandise . ."

The April 5, 1976, ordinance, No. 1310, required only that children under the age of 7 years be accompanied by parent or guardian.

Upon enactment of these ordinances on April 5, 1976, A.C.I. commenced to prepare for operation of a center at Town East by entering into a lease agreement with Homart Corporation, owner of the shopping center, and by investing approximately $80,000 in leasehold improvements. In July of 1976, A.C.I. proceeded to file its application for a license only to have such application denied by the City Manager upon the unfavorable recommendation of the Chief of Police.

Apparently, between April of 1976, when the City Council modified its zoning and amusement center ordinances, and July of 1976, when A.C.I. filed its license application, police investigation revealed that 100% of the stock of A.C.I. was owned by Bally Manufacturing Co., a corporation engaged in the manufacture and sale of coin-operated amusement machines. The Bally Manufacturing Co. and its president had at one time been the subject of a Federal criminal indictment in Louisiana charging participation in racketeering and gambling activities; upon trial, Bally and its president were acquitted of the charges. The police also appear to have information to the effect that Bally Manufacturing Co. is somehow linked to the "mafia" or the "Cosa Nostra." As of July of 1976, the ordinance then in effect, No. 1103, as amended by No. 1310, provided for denial of a license to applicants who had "a connection with criminal elements."

After denial of the license application by the City Manager, A.C.I. appealed the matter to the City Council which on August 16, 1976, affirmed the City Manager's decision. On September 10, 1976, A.C.I. filed a petition in State court

seeking an injunction requiring issuance of a permit to operate an amusement center at Town East Mall. Upon trial to the District Court of Dallas County, 95th Judicial District, a final judgment was entered on January 14, 1977, granting A.C.I. the relief prayed for. The State court concluded as a matter of law that the ordinance then in effect, No. 1103, was unconstitutional under the 14th Amendment of the Constitution of the United States and that such ordinance was also repugnant to Article 1, Sec. 19 of the Constitution of the State of Texas in that the use of the words "connection with criminal elements" are so vague, general and indefinite as to deny A.C.I. due process of law. The State court further found that the City's denial of A.C.I.'s application was not supported by substantial evidence that A.C.I. has any connection with criminal elements.

In compliance with the State court judgment, the City duly issued a license to A.C.I. on January 14, 1977, and proceeded to appeal the State court judgment. A.C.I. opened its amusement center on February 5, 1977. On February 7, 1977, the City Council met and enacted Ordinance No. 1353 repealing Ordinance No. 1310 which had created the exception from the 17-year old restriction discussed earlier. The February 7, 1977, Ordinance went on to attempt to rehabilitate the original amusement center ordinance by adding a definition of the term "connection with criminal elements." The definition added on February 7, 1977, is as follows:

> "*Connection with Criminal Elements* is defined as that state of affairs wherein an applicant, or an officer of, principal stockholder of, person having a substantial interest in or management responsibility for, a corporation or other organization wherein such organization is the applicant, directly or as parent, subsidiary or affiliate, has such association, acquaintance, or business association with parties having been convicted or not, to the extent that the fencing of stolen merchandise or illegally

> obtained funds, the procuring of prostitutes, the transfer or sale of narcotics or illegal substances is made more feasible or likely or the protection of those of tender years from unwholesome influences are rendered more difficult.
>
> A determination by the United States Department of Justice that a party is a member of the 'mafia' or 'Cosa Nostra' family or that such party is engaged in or affiliated with a nationwide crime organization, whether formally or informally, shall be prima facie evidence, so far as the issuance of a license hereunder, that such person has 'connections with criminal elements' and constitute, within the meaning of this ordinance, 'criminal elements.' "

Upon learning of the enactment of the February 7, 1977, ordinance A.C.I. filed the instant action seeking injunctive and declaratory relief.

The initial challenge interposed by the Defendant goes to the question of subject matter jurisdiction; specifically, the City claims that less than $10,000 is in controversy. We believe the correct rule for determining damages is as follows:

> "Where a business is threatened ... by a regulatory statute ... the amount in controversy is the difference between the value of the business unregulated ... and its value under the regulation ..."

C. A. Wright, Law of Federal Courts, Ch. 5, § 33, (3rd Ed. 1976), [citing *McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936) and *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 57 S.Ct. 197, 81 L.Ed. 183 (1936)]. Applying this test, we find that Plaintiff easily satisfies the $10,000 jurisdictional amount.

Plaintiff first challenges the definition of "connection with criminal elements" contained in the February 7, 1977, ordinance. On its face, the definition of "connection with criminal elements," set forth above, is so vague and uncertain that it cannot stand attack, see, e. g., *Lanzetta v. State of New Jersey*, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939) [making it unlawful to be a "gangster"] and *Baggett v. Bullitt*, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed. 377 (1964) [requiring teachers to swear that they were not "subversive persons"]. As part of the judgment to be entered herein, therefore, the term "connection with criminal elements" and the definition of such term contained at Section 9 of the February 7, 1977, ordinance will be declared void for vagueness under the Due Process Clause of the Fourteenth Amendment. This does not dispose of the case, however, as Plantiff also challenges the age restriction and the enforcement of such restriction.

At the preliminary and permanent injunction hearings in this action, the primary evidence elicited, in addition to proving up the background of the case set forth above, was related to Plantiff's contention that the amusement centers it operates are supervised and regulated so as to avoid jeopardizing the public health, safety or morals. Plaintiff also offered evidence to show that over half of its customers are age 17 or below and that the age restriction, therefore, would severely affect the profitability of A.C.I.'s Town East store if it did not render the business entirely unprofitable.

Evidence was offered by the City to prove up the purposes of the City Council in enacting the ordinance. These reasons are set out in the four "whereas" clauses that precede the text of Ordinance No. 1353:

"WHEREAS, coin-operated amusement establishments have a tendency to attract patrons of tender years, and

WHEREAS, the congregation of youthful patrons creates problems of policing due to the need to protect such patrons from the influences of those who would promote

gambling, sale of narcotics and other unlawful activities; and

WHEREAS, it is vital to the safety and welfare of the inhabitants of the City of Mesquite and particularly those of tender years for whom a special duty is imposed upon the governing body to protect, that proper and suitable operators only are licensed to operate coin-operated amusement establishments and that such establishments be regulated to that end; and WHEREAS, it has been determined that the attraction of such establishments for those under seventeen (17) years of age is detrimental to such persons and to the health and welfare of the inhabitants of the City, generally."

Police officers testified that young people congregate at such amusement establishments, that several truancy arrests have been made at such centers (none at Plaintiff's establishment), and that in one instance a juvenile arrested for truancy at an amusement center was later found to be participating in the free school lunch program.

While the above seem incredibly slender reeds upon which to base an ordinance restricting the age at which persons may enter a coin-operated amusement center, there is no fundamental right or interest involved in such legislation and courts have traditionally permitted greater latitude in legislation regulating conduct of minors than of adults, see *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) and *Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968). There is little question but that amusement centers are a proper subject for regulation through the police power. The Supreme Court of the United States has, for example, upheld an ordinance of the City of South Pasadena, California, which prohibited the keeping or maintaining of any hall or room in which billiard or pool tables were kept for hire, except

in hotels having twenty-five or more bedrooms, *Murphy v. People of the State of California*, 225 U.S. 623, 32 S.Ct. 697, 56 L.Ed. 1229 (1912). The Supreme Court deemed the operation of a pool hall to be a "nonuseful" occupation. In addition, the City of Mesquite as a home rule city has power under Texas law, Art. 1175, V.A.T.S.,

> "22. To regulate the location and control the conduct of theaters, moving picture shows, ten pin alleys, vaudeville shows, and all places of public amusements."

The proper test, therefore, is whether there is any rational basis to support such legislation. As the Supreme Court of the United States made clear in *Goldblatt v. Hempstead*, 369 U.S. 590, 596, 82 S.Ct. 987, 991, 8 L.Ed.2d 130 (1962),

> "Our past cases leave no doubt that appellants had the burden on 'reasonableness.' E. g. *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959) (exercise of police power is presumed to be constitutionally valid); *Salsburg v. Maryland*, 346 U.S. 545, 553, 74 S.Ct. 280, 284, 98 L.Ed. 281 (1954) (the presumption of reasonableness is with the State); *United States v. Carolene Products Co.*, 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234 (1938) (exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it)."

Applying this test, Plaintiffs's petition for a permanent injunction to enjoin enforcement of the 17-year-old restriction must be denied.

Plaintiff further argues that the ordinance was calculated to harass it or to circumvent the force of the State court injunction. Although the circumstances are indeed suspicious, we are unable to psychoanalyze the members of the Mesquite City Council to determine their motives and are

limited to analyzing whether the ordinance is unconstitutional on its face or as applied. As Justice Black observed,

> " . . . it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment . . .
> It is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choices of a group of legislators."

Palmer v. Thompson, 403 U.S. 217, 224–225, 91 S.Ct. 1940, 1945, 29 L.Ed.2d 438 (1971).

Plaintiff next argues that under the facts of this case, the City should be estopped to enforce the ordinance. Federal courts have consistently held, however, that State and local governments cannot be estopped from exercising their police power, see, e. g. *Texas & New Orleans Railroad Company v. Miller*, 221 U.S. 408, 31 S.Ct. 534, 55 L.Ed. 789 (1911) and *Sanitary District of Chicago v. United States*, 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352 (1925).

A.C.I. further contends that the ordinance denies it equal protection of the law in that the 17-year-old restriction is allegedly not enforced against another amusement machine establishment. Courts have, of course, found an equal protection violation where an ordinance, valid on its face, was administered in a discriminatory manner, *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). In this case, Plaintiff's claim is that the age restriction is not enforced against an amusement center known as Fun Fair which is located in the Big Town Shopping Center in Mesquite. It would appear, however, that Fun Fair may have qualified as an amusement center located in an enclosed mall within the terms of the April 5, 1976, ordinance and, therefore, have been exempt from the age restriction from April 5, 1976, until the amended ordinance in question was enacted on February 7, 1977. Because enforcement of

the February 7, 1977, ordinance has been enjoined by this Court since February 11, 1977, there were less than four days from April 5, 1976, to the present within which the City of Mesquite had an opportunity to enforce the age restriction against Fun Fair. Upon this record, therefore, we are unable to find that the age restriction has been enforced in a discriminatory manner so as to raise a constitutional question under the Equal Protection Clause of the Fourteenth Amendment.

Plaintiff also argues that the ordinance violates the Equal Protection Clause by *failing* to distinguish between its establishment and the Fun Fair establishment. The argument here is that A.C.I.'s establishment is supervised by an adult who enforces company rules against gambling, smoking, drinking and eating on the premises while no manager is regularly on duty at Fun Fair. We are unable to find any precedent for so holding and are of the opinion that it would be impossible for states and municipalities to custom-tailer every regulatory ordinance to take into account the mode of operation, skill and trustworthiness of each person subject to regulation.

Counsel for Defendant is requested to prepare and submit appropriate form of judgment, approved as to form by counsel for Plaintiff. Costs of this action are to be taxed against the parties incurring same.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ALADDIN'S CASTLE, INC.
vs.
THE CITY OF MESQUITE

CA 3-77-0194-C

JUDGMENT

This action came on for hearing before the Court, Honorable W. M. Taylor, Jr., District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that that portion of City of Mesquite Ordinance 1353 passed by the City Council on February 7, 1977, wherein the term "connection with criminal elements" is stated and the definition thereof contained in Section 9 of said ordinance is void for vagueness and contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

It is further ORDERED, ADJUDGED and DECREED that a rational basis exists for the age classification contained in the City of Mesquite Ordinances prohibiting the playing of pinball machines by those under seventeen (17) years of age and Plaintiff's prayer for injunction is accordingly denied and the temporary injunction heretofore entered is hereby dissolved.

ORDERED entered the 29th day of August, 1977, this 30th day of September, 1977.

W. M. TAYLOR
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2999

D. C. Docket No. CA-3-77-0194-C

ALADDIN'S CASTLE, INC.,
Plaintiff-Appellant
Cross Appellee,

versus

THE CITY OF MESQUITE,
Defendant-Appellee
Cross Appellant.

Appeals from the United States District Court for the Northern District of Texas

Before AINSWORTH, VANCE and ANDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part; and reversed, and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court;

It is further ordered that defendant-appellee cross appellant pay to the plaintiff-appellant cross appellee the costs on appeal, to be taxed by the Clerk of this Court.

November 17, 1980

Issued as Mandate: January 6, 1981

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 77-2990

ALADDIN'S CASTLE, INC.,
Plaintiff-Appellant
Cross Appellee,

versus

THE CITY OF MESQUITE,
Defendant-Appellee
Cross Appellant.

Appeals from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion 11-17-80, 5 Cir., 198_, _____F.2d____).
(December 15, 1980)

Before AINSWORTH, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it,

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

Entered for the Court:

ROBERT S. VANCE
United States Circuit Judge

IN THE

United States Court Of Appeals

For The Fifth Circuit

No. 77-2990

ALADDIN'S CASTLE, INC.,
Plaintiff-Appellant

v.

THE CITY OF MESQUITE,
Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

ELLAND ARCHER
P. O. Box 137
Mesquite, Texas 75149
(214) 288-7711

Attorney for Appellee
City of Mesquite

IN THE

United States Court Of Appeals

For The Fifth Circuit

No. 77-2990

ALADDIN'S CASTLE, INC.,
Plaintiff-Appellant

v.

THE CITY OF MESQUITE,
Defendant-Appellee

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

I. Notice is hereby given that the City of Mesquite, Texas, the Appellee and Cross-Appellant named above hereby appeals to the Supreme Court of the United States from the Order of the United States Court of Appeals, Fifth Circuit overruling City's Motion for Rehearing and Suggestion for Rehearing En Banc entered in this action on December 15, 1980.

This Appeal is taken pursuant to 28 U.S.C. 1254(2).

II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

The entire record of this cause.

III. The following questions are presented by this appeal:

1. Is Municipal regulation of pinball and other coin-operated amusement centers by prohibiting minors under seventeen (17) years of age playing or operating such machines except in the presence of their parent or guardian contrary to the United States Constitution?

2. Is the right of a minor to play a pinball or other coin-operated machine so substantial as to give rise to a Constitutional deprivation?

3. Is the term "connection with criminal elements" unconstitutionally void for vagueness when applied in the context of instructions to the Chief of Police in making an investigation as to an applicant's character where the Chief of Police is not empowered to make a decision as whether or not to issue a license?

4. Did Aladdin's Castle, Inc. have standing to challenge the vagueness of the language in instruction to the Chief of Police directing him to investigate the applicant's "connections with criminal elements" at a time when the applicant had been issued a license and its sole complaint was an apprehension that it might be harmed in the future?

ELLAND ARCHER
P. O. Box 137
Mesquite, Texas 75149
(214) 288-7711

Attorney for Appellee
City of Mesquite

PROOF OF SERVICE

I, Elland Archer an attorney for the City of Mesquite, Texas, and attorney of record for the City of Mesquite, Appellant herein, depose and say that on the 5th day of March, 1981, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Aladdin's Castle, Inc., Appellee herein, by delivering the same to the receptionist in the offices of Bickel and Case, Counsel of Record for the said Aladdin's Castle, Inc., located at 5441 First International Building, Dallas, Texas, 75270.

ELLAND ARCHER

SUBSCRIBED AND SWORN TO BEFORE ME at Mesquite, Texas, this 5th day of March, 1981.

SANDRA PORTER
Notary Public in and for
Dallas County, Texas

Office-Supreme Court, U.S.
FILED
JUL 8 1981
CLERK

No. 80-1577

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

CITY OF MESQUITE

Appellant.

v.

ALADDIN'S CASTLE, INC.

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

ELLAND ARCHER
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Attorney for Appellee

APPEAL DOCKETED MARCH 13, 1981
PROBABLE JURISDICTION NOTED MAY 18, 1981

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RELEVANT DOCKET ENTRIES

1. February 11, 1977; Verified Complaint for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction filed
2. February 11, 1977; Temporary Restraining Order filed
3. February 24, 1977; Defendant's Answer to Plaintiff's Complaint for Preliminary and Permanent Injunction filed
4. March 11, 1977; Defendant's Motion to Dismiss filed
5. March 21, 1977; Preliminary Injunction filed
6. June 6, 1977; Plaintiff's Motion to file Supplemental Complaint with attached Exhibit "A" filed
7. June 9, 1977; Defendant's Motion to Dismiss for lack of Subject matter Jurisdiction filed
8. June 10, 1977; Defendant's Reply to Motion to File Supplemental Complaint filed
9. June 29, 1977; Memorandum opinion filed
10. August 29, 1977; Order filed
11. September 15, 1977; Notice of Appeal from Order entered on August 29, 1977, filed
12. September 28, 1977; Defendant's Notice of Appeal from Order of August 29, 1977
13. September 30, 1977; Judgment ordered entered nunc pro tunc as of August 29, 1977, filed

14. November 17, 1980; Opinion and Judgment of United States Court of Appeals for the Fifth Circuit

15. November 28, 1980; Petition for rehearing **En Banc** in Fifth Circuit Court of Appeals filed

16. December 15, 1980; Order denying rehearing **En Banc**

17. January 6, 1981; Judgment of November 16, 1980, issued to clerk as Mandate

18. March 10, 1981; notice of appeal to the Supreme Court of the United States filed

19. May 18, 1981; Order noting probable jurisdiction filed in the United States Supreme Court

20. May 21, 1981; Order of Supreme Court noting probable jurisdiction filed in United States District Court of Appeals for the Fifth Circuit

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

ALADDIN'S CASTLE, INC.

v.

THE CITY OF MESQUITE

CIVIL ACTION NO.

CIVIL ACTION NO.

VERIFIED COMPLAINT FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION

COMES Now, Aladdin's Castle, Inc., hereinafter called Plaintiff, complaining of the City of Mesquite, hereinafter called Defendant, and for cause of action would show the Court the following, to-wit:

NATURE OF THIS ACTION INCLUDING RELIEF SOUGHT

1. This is an action by Plaintiff to seek a Temporary Restraining Order and Preliminary and Permanent Injunctions to prohibit the City of Mesquite, Texas and all duly

authorized officials of that city from enforcing Ordinance No. 1353, Section 5 purportedly enacted by the City of Mesquite February 7, 1977 as to Plaintiff's place of business at Town East Mall, Mesquite, Dallas County, Texas.

2. As reason for this action Plaintiff would show that such Ordinance is arbitrary, unreasonable, and unnecessary and the effect of it deprives Plaintiff of its property without due process and equal protection of the law under the 14th amendment to the Constitution of the United States and Article 1, Sections 3 and 19 of the Constitution of the State of Texas.

3. Unless this Court immediately grants a Temporary Restraining Order and Preliminary Injunction, Plaintiff will continue to suffer irreparable harm and injury for which there is no adequate remedy at law. Further, this Temporary Restraining Order and Preliminary Injunction is sought in order to maintain the status quo until the rights of Plaintiff can be fully and finally adjudicated. To grant the Temporary Restraining Order and Preliminary Injunction awaiting final adjudication cannot possibly result in any harm or damage precuniary or otherwise to the City of Mesquite, its officials, the citizens of the United States or anyone else.

4. Ordinance No. 1353, a true and correct copy of which is attached hereto as Exhibit "A", the enforcement of which is sought to be immediately prohibited purports to prohibit Plaintiff from allowing anyone under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless accompanied by a parent or legal guardian.

JURISDICTION AND VENUE

5. Plaintiff is a corporation duly incorporated and validly existing under the laws of the State of Delaware

and has been issued a Certificate of Authority by the State of Texas as a foreign corporation to transact business in this State, and Defendant is a municipal corporation incorporated under the laws of the State of Texas located within Dallas County, Texas, which may be served with this Complaint and Citation at the City of Mesquite Municipal Building, 711 North Galloway, Mesquite, Dallas County, Texas, by serving its Mayor, Bob Beard, or its City Secretary, Norma G. McGaughy.

6. Plaintiff operates a coin-operated amusement center at Town East Mall in the City of Mesquite, Dallas County, Texas.

7. The amount in controversy is in excess of $10,000.00 and this action involves the Federal constitutionality of Ordinance No. 1353 and of the official conduct of the City of Mesquite, Dallas County, Texas.

8. In light of paragraphs 5, 6, and 7 above this Court has jurisdiction under 28 U.S.C. §§ 1331 and 1332, 28 U.S.C. § 1343, and 42 U.S.C. § 1981 et seq. Venue is properly laid under 28 U.S.C. § 1391.

RELATION OF FACTS

9. Plaintiff entered into a Lease Agreement dated January 12, 1974, with Homart Development Co., a Delaware corporation, as lessor, and Plaintiff, as lessee, covering certain premises known as 2082 Town East Mayy, Mesquite, Dallas County, Texas, which lease is for the term of ten years at a monthly rental of $2,433.75. The Plaintiff leased the above-mentioned premises in Town East Mall for the express purpose of conducting therein a coin-operated amusement establishment and for this purpose Plaintiff expended approximately $80,000.00 in preparing its premises for business, all with the knowledge and encouragement of Defendant.

10. Defendant, The City of Mesquite, enacted Ordinance No. 1103 on March 19, 1973, which ordinance requires, *inter alia*, a license for coin-operated amusement establishments. Plaintiff notified Defendant during January, 1976, that it desired to conduct its business in Town East Mall, Mesquite, Dallas County, Texas, and requested that Defendant adopt a zoning change to permit Plaintiff to operate in Town East Mall and amend the provisions of Ordinance No. 1103 so as to permit persons under seventeen years of age to operate and play Plaintiff's coin-operated amusement machines. Therefore the Ordinance of the City of Mesquite prohibited persons under seventeen years of age to operate or play such amusement machines unless accompanied by a parent or legal guardian. Pursuant to Plaintiff's above-mentioned requests of Defendant, Ordinances No. 1310 and No. 1314 were enacted on April 5, 1976, to encourage Plaintiff to locate within the City of Mesquite and conduct its business in Town East Mall Ordinance No. 1310 specifically amended Ordinance No. 1103 so as to permit persons under seventeen years of age to operate and play coin-operated amusement machines such as Plaintiff's and to permit persons under seven years of age to operate and play such machines if accompanied by an adult, if such machines were controlled by a coin-operated amusement establishment located within a major shopping center such as Plaintiff's premises in Town East Mall. Ordinance No. 1314 was enacted to adopt a zoning change to grant to Plaintiff a "conditional use designation for an indoor commercial recreation for coin-operated amusement machines within Town East Mall."

11. Pursuant to Defendant's Ordinance No. 1103, Plaintiff heretofore duly obtained a license application from the City Secretary for a coin-operated amusement establishment and submitted such application properly completed to Defendant. However, on July 20, 1976, the City Manager

advised Plaintiff that pursuant to Ordinance No. 1103 he was disapproving Plaintiff's license application based upon an unfavorable recommendation by the Chief of Police. On July 23, 1976, Plaintiff through counsel notified the City Council that pursuant to Ordinance No. 1103 Plaintiff desired to appeal the City Manager's decision to the City Council. The City Council heard Plaintiff's appeal, and on August 16, 1976, the City Council refused to reverse the City Manager's decision and denied plaintiff's license application.

12. Thereafter, and on September 10, 1976, Plaintiff herein instituted suit against Defendant herein in cause No. 76-9329-D styled Aladdin's Castle, Inc. vs. The City of Mesquite in the District Court of Dallas County, Texas, 95th Judicial District. A copy of that Petition is attached hereto as Exhibit "B" and incorporated and included herein for all purposes. Suffice it to say that the action attacked the conduct of the City of Mesquite in that the Ordinance under which it purported to act was in violation of the Federal and State of Texas Constitutions and that the evidence under which the City purported to act under this unconstitutional Ordinance was not substantial evidence as a matter of fact and as a matter of law.

13. That cause of action set out in 76-9329-D was tried in State Court on the 13th day of January, 1977, and a Final Judgment in Plaintiff's favor was rendered and entered by the Honorable Claude Williams on the 14th day of January, 1977. An exact copy of that Judgment is attached hereto as Exhibit "C" and included herein for all purposes.

14. Thereafter and on the 14th day of January, 1977, the City Secretary of the City of Mesquite proceeded to issue a license to Aladdin's Castle, Inc. permitting it to operate a coin-operated amusement establishment at Town

East Mall. The City Secretary accepted the required $100.00 filing fee and gave a receipt therefor.

15. On or about the 20th day of January, 1977, the City of Mesquite by and through its City Attorney gave Notice of Appeal in such cause to the Clerk of the 95th Judicial District Court, Dallas County, Texas, but did not supercede the Final Judgment, and such appeal is presently pending and being prosecuted by the Defendant herein. After Judgment and before January 20th and after January 20th and before February 7, 1977, Elland Archer, the City Attorney of the City of Mesquite, orally stated to Stephen L. Berger, Attorney for Aladdin's Castle, Inc., that the City of Mesquite had no intention of preventing the operation of the coin-operated amusement center by Aladdin's as proposed except through its efforts in the appeal in the judicial proceeding. In that connection attached hereto and made a part hereof is a letter (Exhibit "D") from Mr. Archer on the stationery of the City of Mesquite dated January 31, 1977.

16. Thereafter, and on February 7, 1977, the City purported to enact Ordinance No. 1353. The effect of Section 5 of this Ordinance would be to prohibit persons under seventeen years of age from patronizing Plaintiff's establishment unless accompanied by a parent or legal guardian. The effect upon Plaintiff's business is to virtually prohibit a lawful business in that it becomes economically impossible to operate the center thus leaving Plaintiff with a $80,000.00 unusable capital investment and a $292,050.00 Lease obligation over a term of ten years.

COUNT I

17. In connection with paragraphs 1 through 16 above, Plaintiff alleges that the conduct of the City of Mesquite

in enacting Ordinance No. 1353 and enforcing same as to Plaintiff is not based on public necessity; nor justified on any other grounds; nor is such reasonable in its operation and is in fact unduly oppressive on Plaintiff; nor is the object of Ordinance No. 1353 necessary and appropriate for the accomplishment of any legitimate object within the domain of such City's police power. Such Ordinance No. 1353 is an unreasonable, arbitrary, and capricious exercise and abuse of the City of Mesquite's police power and as such void. The enactment and enforcement of Ordinance No. 1353 is void as to Plaintiff for the reason that such Ordinance and enforcement thereof has no connection and is not necessary and appropriate for the accomplishment of any legitimate object of the City's police power to protect the health, safety, comfort, and welfare of its citizens.

In consideration of all of the above, Ordinance No. 1353 and the enforcement thereof has the effect of depriving Plaintiff of its property without due process of law and deprives Plaintiff of equal protection of the law in violation of the rights of the Plaintiff under the 14th amendment to the Constitution of the United States and Article 1, Sections 3 and 19 of the Constitution of the State of Texas.

COUNT II

18. Plaintiff realleges and reasserts paragraphs 1 through 17 above and would further show the following. At all times since prior to the execution of the Lease with Homart, Plaintiff and its attorney, Stephen L. Berger were assured by the officials of the City of Mesquite that Plaintiff would be permitted to operate its coin-operated amusement center at the chosen location. This course of conduct continued until the denial of the permit, as heretofore alleged in July of 1976. Based upon these assurances the Plaintiff had entered into the heretofore described Lease for a period

of ten years. Based upon these assurances and the conduct of the Defendant in passing the Ordinances it had in fact passed, Plaintiff had additionally spent approximately $50,000.00 in leasehold improvements of various types. Up until the date in July when its application for a license was denied.

19. After its application was denied it ceased to expend any monies seeking only relief through legal channels including the final ruling of the City Council on August 16, 1976 and the perfection of its appeal to the District Court and trial therein.

20. After entry of Judgment on the 14th day of January, 1977 Plaintiff, whose principal office and place of business is in Chicago, Cooke County, Illinois, made contact with the City Attorney, Elland Archer, to determine whether or not the City would take any further action to prevent its operation of its business in light of the conduct of the City Secretary who issued the license on January 14, 1977. The contact was made on behalf of Plaintiff by Stephen L. Berger, its attorney, and Mr. Archer gave oral assurances that the City would take no further action to prevent the operation of the center other than the prosecution of the appeal in the State Court matter. These assurances were buttressed by the letter of Mr. Archer, Exhibit "D" attached hereto. In reliance upon these representations by City officials in issuing the license and in giving the oral and written assurances stated herein, Plaintiff expended another $40,000.00 in causing machines to be shipped to its prospective place of business in Mesquite, Texas, and preparing the place of business for operation.

21. In fact, the coin-operated amusement center was opened and placed in operation on the 5th day of February, 1977.

22. Thereafter, and on the 7th day of February, 1977 the City Council passed Ordinance No. 1353 which purports to prohibit persons under seventeen years of age from playing or operating any of the machines unless accompanied by a parent or legal guardian.

23. The effect of the Ordinance purportedly enacted on the 7th of February, 1977 is unduly oppressive and highly injurious to legitimate business and effectively prohibits its operation. Such conduct on the part of the City was taken by it without any justification or reason under its police powers and solely for the reason of attempting to accomplish something indirectly which the Courts of this State have so far held that it cannot do directly. (Exhibit "E")

24. In the circumstances Plaintiff pleads that the City is estopped even though it was purportedly acting in its public capacity to take the action that it has in view of the detriment suffered by Plaintiff and the benefit received by the City of Mesquite.

NOTICE AND BOND

25. In that the attempted enforcement of Ordinance No. 1353 results in immediate and irreparable injury, loss and damage, this Court ought to grant a Temporary Restraining Order without notice and set the matter for hearing within ten days thereafter.

26. The undersigned attorney, Louis P. Bickel, upon his oath states that he contacted Elland Archer, City Attorney of the City of Mesquite, by telephone notifying him that this Verified Complaint for a Temporary Restraining Order would be filed today and that Plaintiff would attempt to secure a Temporary Restraining Order. Mr. Archer stated that he could not attend but that the Court could call him at 288-7711.

27. Although no possible monetary or other type injury can result to Defendant as a result of the granting of this Temporary Restraining Order or Preliminary Injunction the Plaintiff agrees that it will post bond in whatever amount is set by the Court in compliance with Rule 65(a), Federal Rules of Civil Procedure.

SERVICE OF ORDER

28. The Court ought to enter an Order permitting completed service of its Temporary Restraining Order, if it grants one, by delivery of a copy of this Verified Complaint and a copy of the Temporary Restraining Order to the City Secretary of the City of Mesquite or to Elland Archer by hand-delivery by any attorney acting on behalf of Plaintiff.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that this Court grant the following relief, to-wit:

a. A Temporary Restraining Order without notice prohibiting the City of Mesquite and any of its officials from enforcing Section 5 of Ordinance No. 1353 with respect to the Plaintiff and its operation of its coin-operated amusement center at Town East Mall, Mesquite, Dallas County, Texas, by serving a copy of this verified Complaint and Order upon the City Secretary of the City of Mesquite or Elland Archer by hand-delivery after Plaintiff makes Bond as ordered by the Court.

b. Set the matter for hearing on Preliminary Injunction within ten days after the Temporary Restraining Order is granted and order that the Temporary Restraining Order remain in effect until the ruling of the Court on the Preliminary Injunction.

c. Enter a Preliminary Injunction prohibiting the City of Mesquite and its officials from enforcing Section

5 of Ordinance No. 1353 with respect to Plaintiff's facility at Town East Mall, Mesquite, Dallas County, Texas through Final Judgment on the merits of this cause.

d. Upon final hearing of this cause, grant a Permanent Injunction prohibiting the City of Mesquite and all of its officials from in any way enforcing Section 5 of Ordinance No. 1353 with respect to Plaintiff and its facility located at Town East Mall, Mesquite, Dallas County, Texas.

e. Order that the City of Mesquite be served with Citation and a copy of this Verified Complaint and that it be required to respond in accordance with law.

f. Order the City of Mesquite to pay the Plaintiff its Costs of Court herein expended.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ALADDIN'S CASTLE, INC.
v.
THE CITY OF MESQUITE

CA 3-77-0194

TEMPORARY RESTRAINING ORDER

This cause of action came on to be heard on the 11th day of February , 1977, on the verified complaint of Aladdin's Castle, Inc. pursuant to Rule 65 of the Federal Rules of Civil Procedure for a Temporary Restraining Order. Such Temporary Restraining Order is requested by Plaintiff to be entered without notice to the adverse party herein. However, telephone notice was given to Defendant. The verified complaint makes this request for this relief on the ground that Defendant has enacted a void Ordinance as to it and that enforcement of same would result in irreparable harm and injury to the damage to Plaintiff's business and property.

On basis of Plaintiff's verified complaint, the Court is of the opinion that such ex parte Temporary Restraining Order without appearance of the adverse party should, in all things, be granted because if same is not done, Plaintiff will suffer irreparable injury to its business and property. The foregoing constitutes good and sufficient reason for the issuance of this Temporary Restraining Order without notice or appearance of the Defendant.

NOW, THEREFORE, IT IS ORDERED that the City of Mesquite and all of its officials shall in no way, directly or indirectly, attempt to enforce Ordinance No. 1353 with respect to

the Plaintiff and its facility at Town East Mall, Mesquite, Dallas County, Texas.

Defendant herein is further ordered to disseminate the contents of this Order to all officials of the City of Mesquite including the City of Mesquite Police Department and such communication is to be done immediately.

This Order shall remain in effect until the Court enters an Order on a hearing on the Preliminary Injunction. The Preliminary Injunction is set for a hearing on the 18th day of February , 1977, at 9 o'clock a.m.

I hereby order that this Temporary Restraining Order shall be considered to be served upon the City of Mesquite by hand-delivery of a copy of this Order and a copy of the Verified Complaint to the City Secretary of the City of Mesquite or to its Attorney, Elland Archer, by any attorney representing Plaintiff herein.

The condition of this Order is that Plaintiff shall file a bond in the usual form, to be approved by the Court, in the amount of One Thousand Dollars.

ENTERED AND SIGNED this 11th day of Feb., 1977, at 4:15 o'clock p.m. in the Court's chambers at the Federal Courthouse in Dallas, Texas.

W. M. TAYLOR, JR.
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(Caption Omitted in Printing)

DEFENDANT'S ANSWER TO PLAINTIFF'S COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION

TO THE HONORABLE COURT:

Comes now the City of Mesquite, Texas, and files this its Answer to Plaintiff's Complaint for Preliminary and Permanent Injunction and answers as follows:

I.

The City of Mesquite, Texas, is so far as the prosecution of criminal cases is concerned, the State of Texas under the doctrine of *Benton v. Maryland* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707, and *Waller v. Florida* 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435, and only the State of Texas, not the City of Mesquite, prosecutes violations of City Ordinances. Suit is brought against the City of Mesquite contrary to the Eleventh Amendment of the Constitution of the United States.

II.

The State of Texas has, by statute and constitution authorized the City of Mesquite to regulate the operation of pinball machines. Adjudication of the constitutionality of such regulation can only be by a three judge court.

III.

Plaintiff's complaint fails to state a claim upon which relief can be granted.

IV.

Injunctive relief is not available to restrain the enforcement of State Criminal Ordinances not void on their face.

V.

A preliminary injunction should not be granted because there is not a reasonable likelihood that Plaintiff will prevail on final hearing.

VI.

The right to offer pinball machine amusement service is not a vested property right but is subject to regulation under the police power. There is a rational relationship between the prohibition of those under seventeen (17) years playing pinball machines and the protection of the health, safety, morals and welfare of society and thus, no federal question exists under the Federal Constitution or laws.

VII.

ADMISSIONS AND DENIALS

Subject to the foregoing, Defendant City denys Paragraph 1 of Plaintiff's Complaint in part and says that the real thrust of Plaintiff's action is to have that portion of Article 1175, Texas Revised Civil Statutes, to wit:

> "22. To regulate the location and *control the conduct* of theaters, moving picture shows, ten pin alleys, vaudeville shows, *and all places of public amusements.*"

and

> "34. To enforce all ordinances necessary to protect health, life and property and to prevent and summarily abate and remove all nuisances and to preserve and

> enforce the good government, order, and security of the City and its inhabitants."

and Article 19.01 Taxation, General, Vernon's Annotated Civil Statutes, Section 10, C, to wit:

> "All cities and towns, whether incorporated under general or special law, shall have the power and authority to . . . and may *ban, prohibit, regulate, supervise, control,* or *license* any person firm . . . operating a billiard table within the incorporated limits of such city or town; . . . ."

declared unconstitutional.

VIII.

Defendant City admits paragraphs 4, 5, 6, 11, 12, 13, 14, 15, 21, 22, of the Plaintiff's complaint.

IX.

Defendant City denies paragraphs 2, 3, 7, 8, 17, 23, 24, and 25 of Plaintiff's complaint.

X.

Defendant, due to insufficient facts can neither admit nor deny paragraph 9, except it denys that the City had knowledge of the alleged facts, or encouraged any action by Plaintiff, number 19, in its entirety; that portion of number 18 wherein Plaintiff alleges certain action "based upon assurances and conduct of Defendant"; that portion of number 20 wherein Plaintiff alleges a $40,000.00 expenditure in reliance upon these representations by City officials in issuing the license. With respect to the issuance of the license, the City Secretary issued same under threat of contempt action because Plaintiff's attorney prepared

the judgment, obtained the trial judge's signature and presented same to the City Secretary, all without the knowledge of the City's Attorney and said City's Attorney had no opportunity to give notice of appeal or to supersede the judgment or to consult with City officials and never saw the Order of Injunction prior to issuance of the permit. To the extent issuance of the permit was relied upon for equitable estoppel, such reliance was not reasonable.

XI.

To the extent Paragraph 27 is prefaced with, "Although no possible monetary or other type injury can result to Defendant as a result of the granting of this . . . . Preliminary Injunction, Defendant denys such assertion".

XII.

Defendant City admits the first two sentences of Paragraph 16 and denies the remainder.

XIII.

With respect to Paragraph 10, although certain statements of fact therein are correct the thrust and connotation of the paragraph is misleading, unfair and partially untrue and is therefore denied.

Specifically, the allegation that the action taken was to "encourage" Plaintiff to locate in Mesquite is untrue. All contacts were initiated by Plaintiff and all action alleged Paragraph 10 was solicited by Plaintiff through adroit salesmanship and factual misrepresentation. Plaintiff Company was advised at the first meeting by the Mayor Pro Tem that no company with mafia connections was desired in the City.

With respect to the zoning action taken, such action pertained to the land itself and not any company or individual. It is not within the power of a municipality to condition zoning upon the merits of the owner or user. In other respects the allegations of Paragraph 10 are correct.

XIV.

Subject to the foregoing, Defendant affirmatively pleads that it is a Municipal Corporation organized under powers granted through the Texas Constitution, Article XI, Section 5, and is a co-ordinate agency of the Government of the State of Texas with the State Legislature, deriving powers *directly* from the Constitution and may, but need not, look to the Legislature, for grants of power. Within its sphere of authority it is equal to the Legislature and under the holdings of the highest court of the State, may do any act in such area that the Legislature could have done. A holding by this Honorable Court that the City of Mesquite lacks power to do any act is a holding that such power is not reposed in the soverign State of Texas. No question of State versus City power is before this Court.

XV.

That the determination of what protection is needed by minors under seventeen years of age is inherently and historically a legislative question and was acted upon by the governing body of the City of Mesquite as such.

XVI.

That a "rational basis" exists for the protection of minors from operation of coin-operated amusement ma-

chines defined in the attached ordinance, such basis being as follows:

1. The machines defined are adaptable to gambling.

2. The operator and manufacturer of such machines are engaged in the business of gambling in other areas.

3. Children between seven and seventeen years have insufficient maturity to make decisions on the expenditure of funds at places of this nature without the guiding influence of a parent or guardian and often expend their entire weekly allowance for school lunches in playing such machines and suffer for lack of nutrition the remainder of the week.

4. The possibility of children in the protected age group being taken by "hustlers" is real.

5. The temptation to children of the protected age group to gamble is greater than is prudent to allow, considering the duty of the State to offer guidance in the development of youth into productive, law abiding citizens.

6. The attraction of such machines to minors under seventeen lures children from school attendance and creates a truancy problem.

The owners and operators of this type establishment, including Plaintiff, traditionally and historically have little or no concern for the welfare or proper development of youth and are not proper parties to entrust the welfare of such persons of tender years and the welfare of society will be better served if young persons are not entrusted to such operators, and are prohibited from frequenting such places until they gain additional maturity, or by requiring the supervision of a parent or guardian.

Lack of concern of the Platintiff operator is indicated by the fact that Plaintiff's owner was set up in business by Emprise Corporation and/or the Jacobs family, well known mafia figures, Plaintiff's parent company is still owned by mafia figure associates such as Gerardo Cantena and Plaintiffs ship gaming machines from certain states contrary to federal law. Such atmosphere is unwholesome and unsafe for children of tender years.

XVII.

That the type of machines and the type of establishment comprises the area wherein the State has traditionally protected children and legislation defining such persons as a class for State protection different from that of adults has been approved by the United States Supreme Court.

Therefore the claimed right to earn a profit from such protected persons is not a property right or any right protected by the Fourteenth Amendment.

XVIII.

That Plaintiff is not in any wise denied the right to operate the establishment. That countless other establishments operate under the same and similar provisions relating to those under seventeen years old or eighteen years old in the case of Garland, a copy of said ordinance being attached hereto and made a part of this pleading as if copied verbatim.

XIX.

That the Fourteenth Amendment does not guarantee Plaintiff a right to a profit at the expense of otherwise valid legislation.

XX.

That the expectation of a profit is speculative and uncertain. That other lawful uses are available for the property alleged by Plaintiff including that of a coin-operated amusement center and Plaintiff's plea for equitable relief is not justified.

XXI.

That the need for enforcement of the complained of Ordinance outweighs the need for a temporary injunction where only a claimed loss of profit is at stake, particularly during the regular school year, and the right to have the ordinance obeyed is the status quo rather than the right to disobey the ordinance and the temporary injunctive relief should be denied and a hearing on the permanent injunction should be held before the beginning of the next school year.

Wherefore, premises considered, Defendant City prays that the Preliminary Injunction and the Permanent Injunction relief be denied and that Plaintiff be ordered to pay to the City of Mesquite the face amount of the bond and for such other and further relief to which it may be justly entitled.

CERTIFIED COPY OF RECORD

STATE OF TEXAS
COUNTY OF DALLAS

I, the undersigned, City Secretary of the City of Garland, Texas, a governmental subdivision of the State of Texas, in the performance of the functions of my office, hereby certify that the attached record is a full, true and correct copy of Section 17-13, 17-14, and 17-15 of the Code of Ordinances as the same appears of record in my office, and that I am the lawful possessor and have legal custody of said record.

WITNESS my hand and Seal of said City of Garland, Texas, at my office in said City, County and State aforesaid, this the 16th day of February A.D., 1977.

City Secretary
City of Garland, Texas

is closed, locked and vacated between the hours of 11:30 p.m. and 8:00 a.m. This section shall not apply, however, to pinball machines or other coin-operated games, if such machines or games are locked so that they cannot be played between the hours of 11:30 p.m. and 8:00 a.m. (Ord. No. 1516, § 1, 10-4-67)

Amendment note – Ord. No. 1516, § 2, repealed Ord. No. 1506, from which former § 17-12 was derived, and § 1 of said Ord. No. 1516 enacted §§ 17-12 – 17-16.

Sec. 17-13. Same — Minors prohibited; exception.

No person owning, operating or managing a pool hall shall allow any minor person under eighteen (18) years of age to enter such pool hall or to enter the area in which pool tables and pinball or other coin-operated games are located if kept in a separate area as provided in section 17-12 above, unless such minor person is accompanied by his parent or guardian. (Ord. No. 1516, § 1, 10-4-67)

Note – See amendment note following § 17-12.

Sec. 17-14. Same — Minors prohibited from playing pinball machines, etc. exception.

No person owning, operating or managing any "other place of amusement," as defined in section 17-1 hereof, or any employee of any such person, shall allow any minor person under the age of eighteen (18) years to play any pinball machine or other coin-operated game unless such minor person is accompanied by his parent or guardian. (Ord. No. 1516, § 1, 10-4-67)

Note – See amendment note following § 17-12.

Sec. 17-15. Same — Sign pertaining to minors to be exhibited.

It shall be the duty of the owner, exhibitor or lessee of every pinball machine or other coin-operated game other than those kept in a separate area as provided in section 17-12 above to affix and prominently display a sign on each such machine or game under his control, which sign shall read "PLAY BY MINORS UNDER EIGHTEEN YEARS OF AGE NOT ALLOWED UNLESS ACCOMPANIED BY PARENT OR GUARDIAN". (Ord. No. 1516, § 1, 10-4-67)

Note – See the editor's note following § 17-12.

Sec. 17-15.1. Same — Same — Provided by city.

Signs required by this chapter shall be considered sufficient only if they are issued by the city. The fee for such signs shall be two dollars ($2.00) each, and a duplicate may be issued for damaged or stolen signs. The fee for duplicates shall be one dollar ($1.00 per sign. (Ord. No. 2547, § 2, 3-11-75)

Editor's note – Ord. No. 2547 amended the Code by adding § 17-15.5, which has been redesignated as § 17-15.1 to maintain code format.

Sec. 17-16. Same — Violation grounds for revocation of permit.

The violation of any sections 17-12 through 17-15 above, or any other applicable statute or ordinance shall be sufficient grounds for the revocation of any permit granted pursuant to section 17-3 above. Such permit may also be suspended for a time definite and such suspension and revocation procedure shall be in accordance with section 17-9 of this Code. (Ord. No. 1516, § 1, 10-4-67; Ord. No. 2004, § 5, 10-19-71)

Note – See the editor's note following § 17-12.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(Caption Omitted in Printing)

DEFENDANT'S MOTION TO DISMISS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes the City of Mesquite, Texas, Defendant hereinafter, and files this its Motion to Dismiss in Plaintiff's Suit for Injunction.

I.

There is no substantial federal question.

II.

Plaintiff seeks to enjoin the enforcement of criminal ordinances not void on their face. Plaintiff has an adequate remedy at law.

WHEREFORE, PREMISES CONSIDERED, Defendant prays that Motion for Injunction be dismissed.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(Caption Omitted in Printing)

[9] JULES MILLMAN,

called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BICKEL:

Q. State your name, please, sir.

A. Jules Millman.

Q. What's your age?

A. Thirty-five.

Q. Where do you live?

THE COURT: Wait a minute, spell your last name.

THE WITNESS: M-i-l-l-m-a-n (spelling).

[10] Q. What's your age, please?

A. Thirty five.

Q. Where do you live?

A. Chicago, Illinois.

Q. What's your business, profession or job?

A. I am president of Aladdin's Castle, Incorporated.

Q. What is Aladdin's Castle, Incorporated?

A. We operate coin-operated family amusement centers throughout the United States.

Q. When did you go into that business?

A. I started the business on my own in 1969.

Q. Tell the Court what the business is, how it was started, what it does, what you do.

A. Well, when I graduated from college in 1965 I went to work for a company in Chicago called Worldwide Distributors. Worldwide Distributors is a distributor of all types of coin-operated products. I was employed as a salesman to sell coin-operated food vending machines such as Coke machines, cigarettes machines, candy machines and so forth. A principal part of Worldwide's business was also selling of coin-operated amusement machines such as pinball machines, coin-operated gun games, driving games and so forth. I was not involved in the selling of these games, however, I observed it [11] and I became interested in it. I noticed that most of these games were being sold to operators who were placing them in taverns, amusement arcades and in undesirable parts of the city and in general locations where young people who liked to play the machines couldn't readily get at them and as a result a stigma develops amongst the adults to the machines whereby they would associate the machines with being bad and really not wanting their children to play them.

I came up with the idea to go in business on my own. I always wanted to be in business on my own and I came up with the idea of opening coin-operated family amusement centers, not in the inner city, but in typical suburbia, in suburban areas, in new multi-million dollar enclosed shopping centers such as Valley View and the new Red Bird Mall and such as Town East. My idea was to lease a store in the enclosed mall, to completely carpet it, have an attendant on duty at all hours the store was open, and to strictly enforce certain rules such as no smoking at any

time, no food is permitted on the premises, no Cokes and to completely supervise the operation of the store at all times.

Well, our operation worked. I opened one store, then another and became very successful.

[12] Q. Was your company then acquired by another company and, if so, when?

A. In 1974, in April of 1974 my brother and I at the time were the sole stockholders and we sold our stock to Bally Manufacturing Corporation which is publicly held and on the New York Stock Exchange.

Q. How many stores had you opened up until that time?

A. At that time we had thirty stores in operation and we had an additional eight or nine leases that were signed and under construction.

Q. All right, sir. How many stores do you have in operation at this time?

A. Approximately one hundred.

Q. Where are they located generally speaking?

A. They are located — we have three stores in Canada and the rest are in the United States nationwide from California to New York and all the way down to Miami.

Q. All right. Now, do you have any stores in operation in the State of Texas?

A. Yes, we do.

Q. Where are they?

A. We have one in Valley View Center which is in the city limits of Dallas. We have one in the Site [13] Center which is in Wichita Falls and we have one in Abilene and one in San Antonio.

Q. All right. Are all of these stores that you have told me about located in the shopping center malls?

A. They are all in enclosed suburban shopping centers similar to Town East.

Q. When did you first come in contact with the City of Mesquite in an attempt to open a store in Town East Mall?

A. Approximately two years ago we started negotiating with Homart, who is the landlord, they are owned by Sears and Roebuck, they are the landlord at Town East to open a store in Town East. Our typical procedures which is the procedures I followed in this case is I called Steve Berger, our Chicago attorney, and he in turn hired a local attorney in the Dallas area to inquire as to whether or not there were any local laws or ordinances in the City of Mesquite that would prohibit us from operating in our typical fashion before we signed the lease with Homart. I was informed by Steve Berger, our local attorney, that there were two things that should be brought to our attention. Number one was that the City of Mesquite had an ordinance, current ordinance that said that children under the ages of seventeen years old could not play [14] coin-operated products, coin-operated games without their parents. Number two was that Town East Mall in the City of Mesquite was not properly zoned for our business use.

We hired a local attorney, Steve Berger and our local attorney went to Mesquite to a City Council meeting to inquire as to whether or not the City would be receptive as to allowing us to do business and in turn change their ordinance. We found out they were and the City of Mesquite removed their seventeen-year-old ordinance and in effect changed the zoning so we were able to go in and open our store in Mesquite, however, we were told we would not be issued a license until we finished building our store.

MR. ARCHER: Your Honor, if I may interrupt, I would like to interpose an objection to the hearsay testimony from persons not before the Court.

THE COURT: Well, let's find out who he was talking to.

MR. ARCHER: He just used the term "they."

THE WITNESS: Okay, sir.

THE COURT: That's the only reason I sustain the objection. If he was talking to somebody down here on the street in Dallas, that's one thing, [15] but if he was talking to somebody with the City of Mesquite that's some official, that's something else.

THE WITNESS: Okay. I personally was not at this Council meeting, however, Mr. Steve Berger, and the attorney that we hired were there. When I said "they," I was referring to them because I personally was not at the City Council meeting.

Q. Now, listen to the question, please, sir. Regardless of what anybody told you, did in fact the City of Mesquite pass a zoning ordinance permitting the operation of your center at Town East — I mean the Town East Mall?

A. Yes, they did.

Q. Did in fact the City of Mesquite pass an ordinance permitting persons under seventeen years of age to come into your establishment and play the machines without being accompanied by a parent?

A. Yes, they did.

Q. All right. Now, was this in March or April of 1976?

A. Yes, it was.

Q. All right. Did you go ahead and execute a lease with Sears, Roebuck or Homart, I should call it, then after that?

[16] A. Yes, we did.

Q. All right. What were the terms and conditions of that lease?

A. The terms of the lease was a ten-year lease and to pay rent and other charges to Homart Development in the approximate sum of three thousand dollars per month for the term of the lease.

Q All right. When did you commence payment of the rent?

A. We commenced paying rent in July of '76 which was the approximate time that we were required to open for business.

Q. Are you still paying?

A. We have paid every month since then up to the present.

Q. Okay. Now, in opening the store or attempting to open the store after the two ordinances we just discussed were passed, how much money did you spend and for what?

A. We spent —

MR. ARCHER: At this time I would like to interpose an objection to this question on the grounds that it is completely irrelevant and immaterial to the matter before the Court. There is no estoppel as to the police power of the State [17] or City. They may have some cases, I feel certain they deal with proprietary matters.

THE COURT: Well, I will hear the evidence, now, the effect of it is something else.

MR. ARCHER: Thank you, Your Honor.

THE COURT: But I will overrule the objection.

THE WITNESS: Repeat the question, please.

Q. After the City of Mesquite passed these two ordinances we have just talked about, you stated that you went ahead to open the store, how much money did you spend in doing that and for what?

A. We spent approximately ninety thousand dollars. We spent approximately forty-five thousand dollas on leasehold improvements, meaning physical construction of the store. This is what is known as a shell lease where the landlord gives us the steel, the stud walls and the dirt floor and we had to physically construct the store on our own, do our own electric work and our own plumbing and so forth. The balance of the moneys we spent was on our equipment and getting it here. The coin-operated machines we brought in range from a thousand dollars to five thousand dollars each, transporting them here, hiring a manager, training our help and so forth. In general pre-opening expense.

[18] Q. At the time you were to open, what happened?

A. Well, we were ready to open on a Friday and my supervisor called me in Chicago and said that the person that issues the license in Mesquite was out of town and is it okay if we open today and I said absolutely not, wait until we get an official license. On Monday morning I received a frantic call from the supervisor stating that the City of Mesquite has refused to grant us a license.

Q. Then, what did you do? In speaking, now, if you repeat any conversation from here on, repeat only a conversation from someone with the City of Mesquite and identify them, okay?

A. Well, at this time the City of Mesquite would not give us an answer as to why we were not being or as to why we were being denied a license. Two weeks later I came down to Dallas with Steve Berger and Francis Sweet,

another attorney of ours in Chicago, and appeared before the City Council of the City of Mesquite. The City Council told us he reason they were not giving us a license, were not granting us a license was because the Bally Manufacturing Corporation, our parent company, was part of the Mafia and for this reason they decided not to give us a license.

[19] Q. Okay. What occurred after that?

A. After that — well, of course, we did not open the store. After that we went to Court, District Court in the City of Dallas to present our case and you just explained the rulings. We found that the evidence was circumstantial, was not circumstantial and that it was hearsay, so to speak, and at that time we received our license from the City of Mesquite based on the Court's order and we opened for business.

Q. And that was the case that was tried in State Court in January, 1977, correct, sir?

A. Right.

Q. And the judgment was obtained in January of 1977?

A. Right.

Q. And the license was issued by the City of Mesquite in January of 1977?

A. That's correct.

Q. All right. And then you did go forward and did you spend any more money?

A. We had to spend money in the sense when we were denied our license we had to physically move all the equipment out to another location. We had no idea if and when we would get to bring the equipment back in there. We had to hire a manager because we [20] couldn't hold a manager

for that time. I would say we spent an additional five thousand dollars at that time.

Q. And did you open?

A. Yes, we opened February 5th of this year.

Q. What's the next thing that happened?

A. Well, the next thing that happened is I received a call from a newspaper reporter in the City of Dallas approximately two weeks after this. She had not been aware of the situation that had happened and just asked me to repeat everything that I have just told the Court, just to fill her in so she could write an article. Before I hung up the phone she said, "Are you aware that last night the City of Mesquite reinstated their seventeen-year-old ordinance?" And I replied, "No, I was not." She asked me what I intended to do and I told her that I intended to talk to my attorneys about it and follow through on it.

Q. So you came down here and we prepared a verified complaint which we have filed in this Court?

A. That's correct.

Q. Now, after the January trial did you inquire of your attorneys, don't tell me what they told you, did you inquire of your attorneys as to whether or not the City of Mesquite intended to do anything other than appeal the State Court case to the end of attempting to [21] keep you from opening your store?

A. Yes, I did.

Q. All right. And upon advice of the attorneys — first of all, did your lawyers tell you they talked with anyone at the City of Mesquite about that?

A. Yes, they did.

Q. And after that did you nevertheless proceed to open your store?

A. That's correct.

Q. All right. Now, what type of rules, regulations do you endorse in your store as to who is there, who does what and how does it run?

A. Well, the reason we have been so successful in opening up a hundred stores, I believe, is because we run a tight ship, so to speak. The rules that we enforce, which are rules of our own choosing, are rigorously enforced in all of our stores. Since we do so the landlords, including Homart, make these rules a part of our lease. Included in these rules are we have a full-time attendant on duty at all hours we are opened. Our store hours conform to the mall hours. If the mall is open from 9:00 a.m. to 9:00 p.m. that has to be our hours and we can't stay open later. We allow no smoking in our stores. We allow no food or beverages of any sort. All these rules are enforced.

[22] Q. Do you have any idea how much money your Town East business would make in a period of a year?

MR. ARCHER: Your Honor, we're going to object to this. There is no predicate for this type of question. He's just asking for a guess.

THE COURT: Well, I will overrule the objection. I think we can express an opinion on that.

A. Well, my opinion is based on the hundred stores that we have open and it's also based on my one month's operating experience here and I have found that after we open a store even as little as for a month it falls into a pattern based on our other stores. In my estimate, and it's just a range, the store is definitely profitable and that I expect

to make a profit after all expenses of twenty-five to fifty thousand dollars per year in this location.

MR. ARCHER: Your Honor, I don't wish to waive my objection but now he has answered that he expected to make this. At this time I will object to his testimony of what his expectation is because that is not an estimate, that's simply an expectation or a guess.

THE COURT: Well, I think it's a matter of expressing his opinion about that and it will go to the weight of it.

[23] MR. ARCHER: Thank you, Your Honor.

Q. Now, directing your attention to the passage of the ordinance by the City of Mesquite after you opened your store after you won your lawsuit in the District Court.

A. Right.

Q. That ordinance was passed two days after you opened, do you recall that?

A. That is correct.

Q. All right. Now, when we were getting ready for the hearing the last time, I think a couple of weeks ago, you came down here the day before?

A. Yes.

Q. And didn't you and I and Mr. Steve Berger and Mr. Glenn Portman go out to Mesquite?

A. Yes, we did.

Q. And to the Big Town Shopping Mall?

A. Yes, we did.

Q. Big Town is not where you intend to operate?

A. No, it is not.

Q. All right. Can you tell the Court what you found there?

A. Big Town is another shopping mall located within the city limits of Mesquite. It is an older center. The reason we went out there was to look at [24] another amusement center which supposedly was similar in certain respects to ours. We got out there and I saw a store approximately the size of ours with approximately twenty-five coin-operated games in there. The games that were in there we do not use in any of our stores in the sense that they are from our standards considered junk value. They are games that are ten or fifteen years or older, whereas our games are the current modern games being manufactured.

In addition to that I saw a store which had virtually no decoration. It had exposed neon light bulbs. It had change machines in the center of the floor. It had absolutely no supervision whatsoever. Kids of all ages were playing the games. I observed kids as young as probably six or seven years old just barely able to reach the coin slots without their parents. I didn't see any parents while I was there.

I also saw big step stools on the floor which would enable the little kids to reach the machine. Each machine in the store had a license from the City of Mesquite on it.

We also inquired around as to the neighbors in the mall and also as to the mall security guard to find out if there was an attendant but maybe this was his day off or he was sick. We found [25] out, in effect, that there was no attendant and that there never is an attendant at this location.

We inquired as to how long this particular amusement center had been there and nobody seemed to know. It would be my guess it was somewhere in the neighborhood of five to ten years by the looks of it.

Q. All right. Now, did you see children in that center at Big Town playing without parents who were under seventeen years of age?

A. Absolutely, most of them were under seventeen.

MR. BICKEL: I offer into evidence Plaintiff's Exhibits 1 through 6.

MR. ARCHER: Your Honor, I have no objection to Exhibits 2 and 5, but I object to Plaintiff's Exhibits 1, 3, 4 and 6 on the grounds that they are completely irrelevant and immaterial to the issue before this Court and can only serve to lengthen the transcript or, excuse me, the statement of facts.

THE COURT: Well, I don't even know what they are. Will you describe them to me?

MR. BICKEL: I'm sorry, Your Honor. Exhibit 2 is a copy of the ordinance which we attack, it's 1353.

THE COURT: I understand there is no objection [26] to that and that will be admitted.

MR. BICKEL: Exhibit 3 is a copy of the original Complaint filed in the State Court and the Complaint upon which the case was tried in State Court.

Exhibit 4 is the final judgment in the State Court.

Exhibit 5 is a letter from Mr. Elland Archer to me post judgment in State Court of which I will offer as evidence on the conduct of the City of Mesquite and its assurances.

Exhibit 6 is the findings of fact and conclusions of law in the State Court action.

Exhibit 1 is a copy of the zoning ordinance passed by the City of Mesquite permitting our operation and the ordinance 1310, I call it inaccurately the age ordinance, was passed by the City of Mesquite permitting us to or permit-

ting persons less than seventeen years of age to enter without parental supervision.

MR. ARCHER: Your Honor, as I have said there is no objection to 2 and 5, the others are matters that are completely irrelevant to this case. The Court well knows that zoning doesn't permit any particular company or individual to operate anywhere [27] it simply designates what use the land itself may be put to.

As far as the matters in the State Court there is no matter before the State Court before this Honorable Court today and we object to any offer of any exhibits from the State Court case.

THE COURT: I will overrule the objection. I will let them all in.

Q. Mr. Millman, I have handed you what has been marked for identification as Plaintiff's Exhibits 7, 8, 9 and 10, I think, is that correct?

A. That's correct.

Q. Who took those pictures?

A. I did.

Q. Where were they taken?

A. They were taken at the amusement center in Big Town Mall.

Q. The one you were telling us about?

A. The one I was just telling you about.

Q. Was that the evening of February 24, 1977?

A. That's correct.

Q. When those were taken?

A. That's correct.

MR. BICKEL: We offer them. May I have them?

MR. ARCHER: Are you offering them?

[28] MR. BICKEL: We offer them in evidence.

MR. ARCHER: Again, Your Honor, no objection other than they are not material to any matter that has been presented to the Court.

THE COURT: Oh, they will go to the weight.

Q. 11, 12 and 13, were those photographs taken by you?

A. Yes, they were.

Q. What are they pictures of and where were they taken?

A. They are pictures of my store in Town East Mall in Mesquite.

Q. Did you take them on the evening of February 24?

A. The same evening with the camera that I bought that night.

Q. And they show the attendant, I believe, don't they?

A. Right.

MR. BICKEL: We offer 11, 12 and 13 in evidence.

MR. ARCHER: Same objection to materiality.

THE COURT: I will overrule the objection.

Q. In the hundred or so stores that you operate, sir, since, whenever you started, I forget what the record shows, have you ever had any complaint from any [29] police department about your operation?

A. Not a one.

Q. Have you ever had any complaint from anybody about any claim, whether it's true or not, just claiming of trafficing in any kind of dope?

A. Absolutely not.

Q. Have you ever had any claim made, whether true or not, about the trafficing of beer, liquor or wine?

A. Absolutely not. That's why we don't allow any drink of any sort on the premises.

THE COURT: Why don't you offer the pictures? Don't you want the Judge to see them?

MR. BICKEL: Well —

Q. Were you present when it was discussed back in the spring of 1976 about obtaining an exemption from the seventeen-year-old provision?

A. Was I present?

Q. Yes. Why did they exempt your operation from this ordinance that was in effect saying that child under seventeen years could not go into the place unless accompanied by an adult?

A. Because —

MR. ARCHER: We object on the grounds that it calls for speculation of the witness, Your Honor.

THE COURT: Well, is this based on some [30] statement of some officer or official of the City?

Q. You're lost, aren't you?

A. Yes.

Q. The question is were you present when there was a discussion with people from the City of Mesquite?

A. No, I was not. I was not present at that meeting.

Q. You don't know anything about it?

A. I know about it but I was not present.

MR. BICKEL: Okay. Pass the witness.

CROSS EXAMINATION

BY MR. ARCHER:

Q. Would you tell me your name again, I know it, but I have forgotten.

A. Jules.

Q. Jules, okay, and your last name is Millman?

A. Millman, M-i-l-l-m-a-n (spelling).

Q. Mr. Millman, now, you opened on, what, February, was it February 7th?

A. February 5th.

Q. And the ordinance was passed on February 7th is that correct?

A. I believe so.

Q. Okay. That's what you testified to just a moment ago?

[31] A. Right.

Q. Now, isn't it a fact that prior to February the 5th the agenda containing notice of consideration of this ordinance was already posted on the City bulletin board as required by law?

A. I was not aware of it.

Q. You're not suggesting that it wasn't?

A. I just don't know.

Q. Are you aware that there is a three-day posting requirement in the State of Texas to post agendas containing matters to be acted upon by the Council?

A. I reside in Chicago and it was not brought to my attention.

Q. All right. You don't know one way or the other?

A. I really don't know.

Q. You're not suggesting to this Court then that this matter would only be considered after your place was opened?

A. I don't know for a fact.

Q. Was that what you intended to infer to the Court a while ago when you answered your attorney's questions?

A. Excuse me. Repeat that once more.

[32] Q. Was it your intent to infer to the Court that the City Council of the City of Mesquite only considered this matter of the age limit after your establishment opened?

A. I am not saying it was considered after our establishment was open, I never inferred that.

Q. Were you informed by any of your legal staff, either yours or your parent company's that there was consideration of changing the ordinance relating to age limit well before the case was tried in the State Court?

A. I heard something mentioned about it but I really don't remember.

Q. You were aware there was some discussion about it?

A. There was some discussion, vaguely I remember something.

Q. Now, at that time Aladdin's Castle hadn't won its case in the State Court against the City of Mesquite?

A. No, we had not.

Q. Now, you say you operate in many other cities, has the City Council in any of these other cities ever changed any of their ordinances?

A. After we have been in operation?

[33] Q. Yes.

A. Not to my knowledge.

Q. Well, have they changed any of their other ordinances?

A. Well, if they changed ordinances not relating to us I wouldn't be aware of it.

Q. Have you ever heard of a City changing an ordinance?

A. Yes, I have.

Q. So you weren't completely unaware that cities sometimes do change ordinances?

A. No, cities have a right to change an ordinance in certain circumstances I imagine.

Q. You knew when you put in your operation here that there was some possibility that the City of Mesquite might change some of its ordinances, did you not?

A. I was almost a hundred percent confident that when we started building our store that they changed the ordinance for us because we were at the Council meeting. They changed the ordinance on the seventeen-year-old law for us. And they changed the zoning for us. I had not fear whatsoever that the City would reverse its decision and put these ordinances in.

[34] Q. Was that ordinance passed by unanimous vote or divided Council vote?

A. Uh, I was not present, but I understand that it was a unanimous vote. This is my understanding.

Q. Were you told that Mr. B. J. Smith voted in favor of the ordinance sustaining the seventeen-year-old ordinance and/or the zoning ordinance?

A. I was not there.

Q. You had not heard there was some opposition to changing either of these ordinances or both?

A. The only thing that I heard was when the newspaper reporter called me, I don't recall her name, stating that the ordinance was passed, that the seventeen-year-old law ordinance was reinstated. That's the only time I heard of it and then I called in my attorneys.

Q. You're a businessman who has to deal with cities throughout the country, is that correct?

A. That's correct.

Q. So you have some understanding of the operation of cities, city government, do you not?

Yes, I do.

Q. You're aware, are you not, that sometimes when there is divided sentiment on the Council that it can go one way or the other?

A. Yes, I am.

[35] Q. And you made no effort to determine whether or not the sentiment on the Council was divided or whether it was unanimous?

A. I don't know.

Q. You don't know. You didn't really rely a whole lot on what the Council did, did you?

A. Well, at the initial time, I know the initial time we were before the Council, I know it was unanimous that they would not grant us our license.

Q. Yes. But I am talking about the ordinance allowing Aladdin's Castle to be the only place in town that could have six-year-old children playing pinball machines, did you believe or did somebody tell you that that was unanimous?

A. No.

Q. And you're aware that it either was or it could have been by a divided vote?

A. It could have been.

Q. All right. So if it could be a divided vote then you, as a businessman, experienced in dealing with cities had some reason to expect that there was some possibility that those opposing the ordinance might very well prevail in the future and get the others to go along with changing it, isn't that correct?

A. It never entered my mind at the time due to [36] the fact that this was done for us. It just never entered my mind that the City would go back and reverse it two days after we opened.

Q. You testified just a moment ago that you had never had any what, any complaint from a police agency that — what was your testimony, I have forgotten?

A. To the best of my knowledge I have never received a complaint from a police department that there has been a problem in any of our stores.

Q. Did you receive a letter from Cleo Frank, Chief of Police of the City of Sheboygan, Wisconsin or do you recall?

A. I don't recall ever seeing that letter.

Q. Is that the letter that you submitted to the City secretary in the hearing held on the license application of Aladdin's Castle either through yourself or your attorneys?

A. Probably so in the sense that we have written letters to police departments asking them from time to time on the running of our operation if there is anything we should

know because we are anxious to cooperate with the police departments. That was probably one of the letters sent to our office or sent to me in response to that, I don't know for certain that this was in the evidence but I assume that probably it was.

[37] Q. Does it not say "At the most I can only identify an isolated incident or two of having been called to remove an unruly person"?

A. It does.

Q. It does say other things and you're quite welcome to read it.

A. The thing is this is a letter that we solicit. The police department, if there was an incident, never called us on the incident, and even as this letter states the incident was so minor they never called us. This is a solicited letter and the incidents were insignificant and were not brought to out attention.

Q. When you say "never" you mean almost never? Well, he did make a complaint in this letter, didn't he?

A. He stated something in the letter that was not stated to me at the time the complaint was made because the complaint was insignificant. It was not significant enough for the police department to issue a complaint and contact our office or our manager or anybody else. When we inquired of the police department, they checked their records and they stated the facts that were on their records and that's what the letter says.

[38] MR. ARCHER: I will pass the witness.

MR. BICKEL: No further questions, Your Honor.

THE COURT: You may step down.

MR. BICKEL: We rest, Your Honor.

THE COURT: All right.

MR. ARCHER: Your Honor, at this time we have witnesses here but it's obvious they have made no showing whatever to justify injunctive relief and we would like to ask that the Court deny the application for preliminary injunction and save time.

THE COURT: Well, I will deny that motion.

MR. ARCHER: We will call Sgt. Smith.

JIMMY W. SMITH,
called as a witness in behalf of the Defendants, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ARCHER:

Q. State your name, please.

A. Jimmy W. Smith.

Q. How are you employed?

A. As a police officer for the City of Mesquite.

Q. How long have you been so employed?

A. Approximately twelve years.

[39] Q. State in what capacity you have been employed giving the approximate time to the best of your recollection.

A. I have been in the crime prevention area for the past six months. Preceding that I was a patrol supervisor for about a year. Preceding that I was in the plain clothes division of the police department, part of that time period being as juvenile officer and working in that area, that comprised about two and a half years.

Q. Two and a half years as juvenile officer?

A. Yes, sir, or dealing at least with juveniles.

Q. All right. Could you describe the nature of your work with juveniles as an officer or in your work dealing with juveniles whatever it is?

A. Yes, sir. In investigation of offenses involving juveniles, working with youngsters in regard to truancy and matters of that nature.

Q. Now, what period of time was this that you worked with juveniles?

A. Approximately from 1973 to 19 — 1972 to about 1974.

Q. All right. Then, was it after that that you worked patrol?

A. Yes, sir.

[40] Q. And in patrol did you have any dealings at all with juveniles?

A. Yes, sir.

Q. What was your position in patrol?

A. As a patrol supervisor.

Q. All right. You had how many squad cars under your supervision?

A. Usually five or six at any given time.

Q. Did that include all of the patrol squads of the City on a given shift?

A. Yes, it did.

Q. So were you responsible for all of the patrol activity on any particular shift that you might work?

A. Yes, sir, that's correct.

Q. And that lasted until what approximate date?

A. Until 1975, mid-1975.

Q. All right. Are you aware of any coin-operated establishments or coin-operated establishments or pinball places in the City of Mesquite?

A. Yes, sir, but primarily those that exist, some do not not exist at the present time.

Q. Either that exist now or existed during the period of time that you began working with juveniles up until the time you terminated your patrol work?

[41] A. Yes, sir.

Q. Could you estimate approximately how many that you had official dealings with as a part of your police work?

A. I believe three or four locations.

Q. Would you list some of those places and their approximate locations?

A. One, the primary point of problems to us was the Fun Safari located on South Galloway in Mesquite near Mesquite High School and then the Pizza Spa located on Tradewind Drive which was to some degree in close proximity to North Mesquite.

Q. What, if any, problems of law enforcement did you encounter involving these places and persons under seventeen years of age?

A. The biggest problem I encountered was that of truancy.

Q. Could you describe for the Court what truancy problems you encountered?

A. Yes, sir. During school hours we continually found youngsters that were supposed to be at school engaged in play or engaged in the operation of amusement machines.

Q. Now, was this just on isolated occasions?

A. No, sir, for the most part it was every day [42] at least while I was in the juvenile area. I encountered the situations nearly every single day.

Q. Tell the Court then if this was a substantial problem in your work?

A. Yes, sir, it was.

Q. Could you give any estimate of the numbers that you say you might deal with in a given day or what would be a typical day?

A. In a typical day perhaps two or three youngsters being picked up that I knew to be definitely truants and returning those students to school.

Q. What other problems?

A. On one or two occasions of my own knowledge I found evidence of drug use in the restrooms at one of the establishments or what appeared to be drug use, a needle syringe, what I considered to be drug paraphernalia.

Q. Did you or any of your officers under your supervision ever make any arrests of juveniles for drugs or other charges?

A. I am not aware of any specific incident like that.

Q. Your testimony is then you don't recall?

A. No, sir, I don't recall any specific incidents.

[43] Q. Based upon your experience in this work as juvenile officer, in your work with the juveniles, do you have an opinion as to whether or not the operation of pinball machines that allows those under seventeen years of age to play is detrimental to law enforcement and/or

creates problems for law enforcement, in particular truancy work, in the City of Mesquite?

A. I feel it is, yes.

MR. ARCHER: Pass the witness.

CROSS EXAMINATION

BY MR. BICKEL:

Q. Officer Smith, Sgt. Smith, I am sorry.

A. Yes, sir.

Q. Sergeant, you named three locations.

A. Yes, sir.

Q. Were these located on a street as distinguished from in a shopping mall, do you follow me?

A. One was in a shopping center.

Q. Which one was that?

A. The Fun Safari.

Q. What shopping center was that?

A. It was in the Mesquite Central Shopping Center. The Pizza Spa was in a small shopping center that was not really formally named.

[44] Q. I want to get your testimony straight. Now, you said that two or three children or boys a day would be in these places and not in school, is that what your testimony was?

A. Yes, sir.

Q. Are you telling the Court that if those places had not existed those boys would have been in school? You're not telling the Court that?

A. I can't say that, no, sir.

Q. Of course not.

A. I can only say that those particular people that we found at those locations were in fact truant and something appeared to bring them to that area. We didn't find this congregation at other places.

Q. All right. I am unclear as to your testimony about the drug paraphernalia, what is your testimony about that?

A. My testimony is at least on one occasion I found what I considered to be drug paraphernalia in one of the restrooms at a time when we were checking the location for truancy.

Q. What restroom?

A. The Fun Safari.

Q. Okay. Is the Fun Safari still in operation?

A. It is not.

[45] Q. When did it go out of operation?

A. I am not sure, sir.

Q. A couple of three years ago?

A. About a year ago.

Q. Did you know that my client's place of business does not have restrooms?

A. No, I am not familiar with your client's situation.

Q. Have you, Sergeant, talked to any member of the City Council about this matter, any member?

A. No, sir. As a rule, I don't talk to the City Council about police problems.

Q. You never have?

A. To my knowledge I don't ever recall talking to a City Council member. I keep my problems within the department, I let the Chief do the talking to the Council.

Q. Are you familiar with the place located in Big Town called Fun City or something like that?

A. I am aware of it, yes, sir.

Q. What is it?

A. It's an area designated there and I believe they have amusement machines, I'm not sure of just what type.

Q. You have seen it before?

[46] A. I have seen it, yes, sir.

Q. Have you ever had any trouble with it?

A. I have not had trouble with it.

MR. BICKEL: Nothing further. Thank you.

MR. ARCHER: That's all I have.

THE COURT: You may step down.

MR. ARCHER: We'll call Officer Carruthers.

MARGARET CARRUTHERS,

called as a witness in behalf of the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ARCHER:

Q. State you name, please.

A. Margaret Carruthers.

Q. How are you employed?

A. Police officer for the City of Mesquite.

Q. How long have you been so employed?

A. I've been a police officer since October of 1970.

Q. How long have you been with the City of Mesquite?

A. Since May of 1966.

Q. Now, was there some period of time that you did a certain type of work that you were not classified [47] as a police officer but you did that you considered in the nature of police work for some length of time prior to 1970?

A. Yes.

Q. What was the nature of that work?

A. From 1966 to 1970 I was a dispatcher.

Q. Well, but at what time did you begin work with juveniles?

A. 1970, in May of 1970.

Q. All right. And that continued until what time?

A. June of 1975.

Q. Approximately five years. And what was the nature of your work that you have done, Officer, what was your title, if you had one?

A. I was juvenile officer.

Q. What were your duties, juvenile duties?

A. I handled offenses involving juveniles as victims and as suspects.

Q. As a part of your duties, were you aware of coin-operated machine establishments and pinball machine places whether they were called that or not in the City of Mesquite?

A. Yes sir.

Q. Could you estimate about how many that you [48] were aware of and actually worked in connection with those places during your period of employment as juvenile officer?

A. Okay. I can think of three places. Now, as far as how many owners each of them had I don't know, I couldn't tell you. I know each of them went through several owners but there were three different locations in the City.

Q. You're talking about now those that are coin- operated machine establishments, is that correct?

A. That's correct.

Q. What about other places that were not classified as coin-operated establishments but had pinball machines or other type of coin-operated machines, are there quite a few of those?

A. You mean like the 7-Eleven store or something like that?

Q. Cafes, restaurants, or what have you?

A. Uh, I would say there is a few but I don't think there is a large number.

Q. All right. Now, as a part of your work as a juvenile officer did you find any problem related to persons under seventeen years of age at these type of establishments?

A. All three locations, establishments that were [49] coin-operated establishments in itself were a constant problem for the Juvenile Division.

Q. Would you describe the nature of these problems?

A. Okay, the biggest problem was truancy. We were constantly picking up truants out of the establishments and taking them back to school. That would be by and far the largest problem. Then we had just a constant problem with

runaways, parents complaining their children spend their lunch money there. Parents complaining that their children were staying there at night. I would say that I got at least one complaint a day on these establishments, then lots of times there were a lot more than that, but to average it out, I would say at least one.

Q. Could you give the Court some idea of the number of truants you might find on a particular day in the different pinball machine or coin-operated machine establishments, I don't mean every day, just a typical day?

A. I would say it would probably average two to three.

Q. Per day?

A. Any time we chose to go in and check students.

Q. Is it possible you checked more than once a [50] day, you know, there were other things we had to do. We couldn't check every day and it was rare that we would check twice a day. Normally we tried to, whenever we had time, we went by and checked.

Q. Was there sometimes more and sometimes less?

A. Yes.

Q. Are you telling the Court that the problem was substantial?

A. Yes, sir.

Q. Substantial as you understand it, it substantially affected your work?

A. All I can tell you is that it was a common problem and that we commonly stopped whenever we had time to stop. If we were in the area we stopped and checked, that's how common the problem was.

Q. Tell the Court something about the runaways that you mentioned, do you recall any incidents?

A. Well, this is one place that runaways could go and a runaway needs some place to go where they can hang around. They don't always have a place to go. They could go there and stay all day and not stand out like a sore thumb. If they hang around other areas, you know, someone is going to notice them and call the police. They could go there and also make other contacts to get them something to eat or money from [51] other students and so forth.

Q. What age people are you talking about, these runaways?

A. Thirteen to sixteen.

Q. Did you encounter any substantial number of these cases of runaways?

A. Yes.

Q. Could you give the Court some idea of what you mean by substantial number? I realize you don't recall the exact number, but could you give the Court some kind of an estimate?

A. It would be hard to put a figure on it because, you know, they are there. As far as putting an exact number on the arrests made or anything like that it would be difficult for me to give you a number. I can just tell you that it was like we were over there checking for them and they would say, well, so and so is here or they just left or we would find them there. Their parents would come in and say I went in the front door and they ran out the back, this kind of thing.

Q. Based upon your experience, your five years experience as a juvenile officer, do you have an opinion as to whether or not the operation of these coin-operated machine establishments in the City of [52] Mesquite and the attendance of those under seventeen at those places

substantially, is substantially detrimental to law enforcement and school attendance? Do you have an opinion one way or the other?

A. It presents a very serious problem for juvenile law enforcement people to handle.

Q. Do you have an opinion as to whether or not it is detrimental to school attendance?

A. Yes, very definitely.

MR. ARCHER: Pass the witness.

CROSS EXAMINATION

BY MR. BICKEL:

Q. Why don't you close them down?

A. Well, you have to have a reason to close them. We did try to work with the people and ask them. Like, a big problem was students going before school and they would get in their playing the machines and they just didn't go to school. Maybe they had intended to go to school but they would get there and start playing and decide not to go. And finally many of them we did close down.

Q. You left some of them open?

A. I think there is — well, there is not any that I know of just strictly pinball establishments now [53] left.

Q. Would it shock you to know there was one in operation?

A. At Town East Mall?

Q. In Big Town.

A. No, it would not shock me. No. I know there is.

Q. Well, there is one that has been going on for ten years, right?

A. I don't know how long it's been there.

Q. You've been with the police department that long and it's been going on for at least seven years since you have been active?

A. Not to my knowledge.

Q. You don't know?

A. No.

Q. I want to say right now that I want the City of Mesquite to enforce every single ordinance that it thinks ought to be enforced for the health and safety of its children. I want to make that clear. But I want you to tell me whether or not there is any reasonable relationship, any reasonable relationship between my client's operation, which is in operation in fact in Town East Mall, and crime of any kind under oath.

A. I'm not sure I understand the question.

[54] Q. Let me ask you if there is any —

A. Mr. Archer asked me my opinion and I am no longer in the juvenile division, I'm not in contact with those particular type of problems.

Q. That's what His Honor wants to know, you see?

A. At this point right now I am in patrol, but when I was in the juvenile division the establishments that were in operation at that time were a constant large volume headache and problem.

Q. They may have been a headache and problem but I am asking about whether or not it was —

A. And it was detrimental to our juveniles.

Q. The question is is there any reasonable relationship with the operation of those businesses and crime of any type?

A. Truancy, juvenile delinquency, drugs, alcohol, fights.

Q. Truancy, drugs, alcohol, fights?

A. All of those were at those locations.

Q. You're telling me if those locations had not existed those children would have been in school, is that what you're saying?

A. I believe that some of those children would have been in school, yes, sir.

Q. Are you telling me if those locations had not [55] been in existence those children would not have come into contact with drugs or alcohol, is that what you're saying?

A. Okay, can I explain? Can I answer your question?

Q. Yeah.

A. Okay, if you have a house, you can lock it up, but a burglar can get into it, but he's going to go to a place that is the easiest to get into. If your house is locked securely he would rather go into the house next door that's unlocked. That's how I feel. No, doing away with pinball machines is not going to do away with truancy.

Q. Of course not.

A. And runaways and drugs and everything else.

Q. Of course not.

A. But it does flourish at those locations.

Q. Is there smoking and drinking or was it and eating permitted at those locations that you have reference to that you dealt with when you were in juvenile work?

A. Yes, sir.

Q. It was permitted?

A. Yes, sir.

Q. All right. Was there a supervisor or manager [56] I ought to say in charge of those places? Do you follow me? Have I made my question clear?

A. Most of them. At some point perhaps there was just an employee but a great deal of the time the owner was at the establishment. Okay.

Q. Yeah. I wanted to find out whether they were supervised, you see? Were they or weren't they?

A. You're going to have to — in my opinion they were not supervised but it's just a matter of what you call supervised.

Q. Was there an adult there?

A. The owners were adults.

Q. Were they present?

A. Yes, sir.

Q. And still these fights would go on?

A. Yes, sir.

Q. Now, then, have you talked to any member of the City Council about this?

A. No, sir.

MR. BICKEL: No further questions.

MR. ARCHER: That's all we have from this witness.

THE COURT: All right.

MR. ARCHER: At this point we rest.

MR. BICKEL: Officer Drew as an adverse [57] witness.

WILLIAM C. DREW,

called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BICKEL:

Q. State your name, please, sir.

A. William C. Drew.

Q. You are a detective sergeant, I believe, with the City of Mesquite Police Department, sir?

A. Yes, sir.

Q. I believe you were the investigating officer with reference to the issuance of the license to Aladdin's Castle in 1976?

A. Yes, sir.

Q. You were a witness at the trial in January of this past year when it was tried in State Court, is that correct?

A. Yes, sir.

Q. Is it true that you told me in the hall that if Aladdin's Castle or my clients had been attempting to open a clothing store that it wouldn't have made any difference, didn't you tell me that?

A. I don't recall that.

[58] Q. But your main objection was just pinball machines, period, did you tell me that?

A. I don't specifically remember saying that.

Q. Well, you don't like them, do you?

A. Just pinball machines?

Q. Right.

A. I really have nothing against pinball machines.

MR. BICKEL: No further questions.

MR. ARCHER: No questions.

THE COURT: All right.

MR. BICKEL: We rest, Your Honor.

MR. ARCHER: I might ask one other question that I neglected to ask.

THE COURT: All right.

CROSS EXAMINATION

BY MR. ARCHER:

Q. You testified you had no objection to what, to pinball machines, is that what your answer was?

A. I believe he asked me if I liked pinball machines.

Q. Could you tell me what you meant by your answer, I'm not sure I know what you mean.

A. I'm not entirely sure what he meant by the question. My impression was did I have anything personally against pinball machines and I don't have [59] anything personal against a pinball machine.

Q. Well, confining the question to the content of what's being discussed here in your presence, pinball machines in the City of Mesquite for use, for people to put coins in and play them, do you have any objections to that in the City of Mesquite?

A. Yes, sir, I do.

Q. When did you reach that feeling or objection?

A. I have had it for several years.

Q. Before you ever heard of Aladdin's Castle?

A. Yes, sir.

Q. Why do you object to them?

A. Because of my experience as a police officer.

Q. Well, what has your experience as a police officer shown you that would cause you to object to them?

A. Calls of disturbances at the pinball machine establishments and my personal experience at these places.

Q. Could you relate any specific incidents that you can think of?

A. I have answered several when I was in the Patrol Division. I answered several fight calls they had. Establishments called. The Fun Safari and I have also made a narcotics arrest at the Fun Safari.

[60] Q. Did you and Sgt. Robertson come to my office two or three years ago and talk to me about trying to close this Fun Safari place down?

A. I don't believe I was in on that, I was aware of the problem.

Q. Okay. Did you concur in that desire?

A. Yes, sir.

Q. Now, at that time had you ever heard of Aladdin's Castle?

A. No sir.

Q. Did you have any indication they were going to file any lawsuit against the City of Mesquite?

A. No, sir.

MR. ARCHER: Pass the witness.

MR. BICKEL: Nothing further, Your Honor.

THE COURT: All right.

MR. BICKEL: We rest.

THE COURT: You may step down.

MR. ARCHER: At this time we rest.

THE COURT: All right.

[65] MR. ARCHER: *Murphy versus California* is 225 U.S. 623, 32 Supreme Court, 697, 56 Lawyer's Edition 1229. The *Murphy versus California* case simply held that this was a part of the police power of the states and that as long as there was any rational basis for the existence of such a statute the wisdom of the statute was not an issue. I think that certainly there is a rational basis or at least an arguable basis for contending or requiring a parent or a guardian when those under seventeen years old play these potential gambling machines. We're not contending that any gambling has taken place, we don't know whether any has or not.

THE COURT: We can gamble on pitching pennies at the crack.

MR. ARCHER: I understand that.

THE COURT: Kids can do that. Do you keep them off the sidewalk because they might gamble by pitching pennies at the crack?

MR. ARCHER: Your Honor, I am going by what the cases have held for the last hundred years. I realize that you can bet on the outcome of this lawsuit.

[66] THE COURT: Sure.

MR. ARCHER: But I don't think you could ban lawsuits just because someone might bet on them. I think it has to do with the tendency to attract that sort of thing. Sure, I realize you can bet on anything, but you and I both know when people play these machines there is some possibility that they are going to feel like betting back and forth. But that's not the major part of my argument, I simply said that the Courts have held that this type of machine can either be banned or regulated.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(Caption Omitted in Printing)

I, Norma G. McGaughy, City Secretary of the City of Mesquite, Texas, hereby certify that the attached are true copies of Ordinances Nos. 1103, 1310, 1314 as adopted by the City Council of the City of Mesquite, Texas.

NORMA G. MCGAUGHY

Norma G. McGaughy
City Secretary
City of Mesquite, Texas

EXHIBITS OFFERED AT PRELIMINARY HEARING

(Offered at A.J. 40; P. 26, Transcript of Proceedings in Preliminary Injunction Hearing — Admitted at A.J. 41; P. 27, Transcript of Proceedings in Preliminary Injunction Hearing)

ORDINANCE NO. 1314

APPLICATION 1095-11

AN ORDINANCE OF THE CITY OF MESQUITE, TEXAS, AMENDING THE COMPREHENSIVE ZONING ORDINANCE OF 1973, DULY PASSED BY THE CITY COUNCIL ON SEPTEMBER 4, 1973, SO AS TO GRANT A CONDITIONAL USE DESIGNATION FOR AN INDOOR COMMERCIAL RECREATION FOR COIN-OPERATED AMUSEMENT MACHINES WITHIN THE TOWN EAST MALL WITH THE STIPULATIONS THAT THE

OPERATION IS TO BE CONDUCTED AS PRESENTED AT THE PUBLIC HEARING; OTHERWISE THE LICENSE WOULD BE WITHDRAWN; OTHER STIPULATIONS SHALL INCLUDE THAT SUPERVISORS, AGE 25 YEARS OR OLDER APPROVED BY THE CHIEF OF POLICE, SHALL BE ON DUTY AT ALL TIMES, AND THAT THRE SHALL BE NO SALE OR CONSUMPTION OF FOOD OR DRINK, AND SMOKING AND GAMBLING SHALL NOT BE ALLOWED ON THE PREMISES; SAID PROPERTY BEING LOCATED IN THE JOHN T. NELMS SURVEY, TRACT 3, ABSTRACT 1095, CITY OF MESQUITE, DALLAS COUNTY, TEXAS, AND BEING MORE FULLY DESCRIBED IN EXHIBIT "A" AS ATTACHED HERETO AND MADE A PART OF THIS ORDINANCE; BY REPEALING ALL ORDINANCES IN CONFLICT WITH THE PROVISIONS OF THIS ORDINANCE AND RETAINING IN FULL FORCE AND EFFECT ALL PROVISIONS OF THE 1973 ZONING ORDINANCE TO THE LAND HEREWITH ZONED; BY PROVIDING FOR A SEVERABILITY CLAUSE; BY PROVIDING FOR A PENALTY NOT TO EXCEED TWO HUNDRED DOLLARS ($200.00) FOR EACH OFFENSE; AND DECLARING AN EMERGENCY.

WHEREAS, the City Planning Commission of the City of Mesquite and the governing body of the City of Mesquite in compliance with the Charter of the City of Mesquite and State laws with reference to granting of zoning changes under the Zoning Ordinance Regulations and Zoning Map, have given the requisite notices by publication and otherwise and, after holding due hearings and affording a full and fair hearing to all property owners generally and to the persons interested and situated in the area, the City of Mesquite is of the opinion that the said change of zoning should be granted herein:

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MESQUITE, TEXAS:

SECTION 1. That the Comprehensive Zoning Ordinance of 1973, duly passed by the City Council of the City of Mesquite, Texas, on the 4th day of September, 1973, be, and the same is, hereby amended by amending the Zoning Map of the City of Mesquite so as to grant a conditional use designation for an indoor commercial recreation for coin-operated amusement machines within the Town East Mall with the stipulations that the operation is to be conducted as presented at the public hearing; otherwise the license would be withdrawn; other stipulations shall include that supervisors, age 25 years or older, approved by the Chief of Police, shall be on duty at all times, and that there shall be no sale or consumption of food or drink, and smoking and gambling shall not be allowed on the premises; said property being located in the John T. Nelms Survey, Tract 3, Abstract 1095, City of Mesquite, Dallas County, Texas and being more fully described in Exhibit "A" as attached hereto and made a part of this ordinance.

SECTION 2. That all ordinances, or portions thereof, of the City of Mesquite in conflict with the provisions of this ordinance, to the extent of such conflict are hereby repealed.

To the extent that such ordinances or portions thereof not in conflict herewith, the same shall remain in full force and effect.

SECTION 3. That the property described in Section 1 of this ordinance, shall be used only in the manner and for the purposes provided for by the Comprehensive Zoning Ordinance of 1973.

SECTION 4. That should any paragraph, sentence, subdivision, clause, phrase, or section of this ordinance be adjudged or held to be unconstitutional, illegal, or invalid, the same shall not affect the validity of this ordinance as a whole, or any part or provision hereof other than the part so decided to be invalid, illegal, or unconstitutional and shall not affect the validity of the Comprehensive Zoning Ordinance of 1973 as a whole.

SECTION 5. That any person, firm, or corporation violating any of the provisions or terms of this ordinance shall be deemed to be guilty of a Class C Misdemeanor and subject to the same penalty as provided for in the Comprehensive Zoning Ordinance of 1973, of the City of Mesquite, and upon conviction in the Municipal Court shall be punished by a fine not to exceed Two Hundred Dollars ($200.00) for each offense.

SECTION 6. Whereas, the property described in Section 1 of this ordinance requires that it be given the above classification in order to permit its proper development and in order to protect the public interest, comfort, and general welfare of the City of Mesquite, creates an urgency and an emergency for the preservation of the public health, safety, and welfare and requires that this ordinance shall take effect immediately from and after its passage and publication of said ordinance, as the law in such cases provides.

DULY PASSED AND APPROVED by the City Council of the City of Mesquite, Texas, on the 5th day of April, A.D., 1976.

BOB BEARD

Bob Beard
Mayor

ATTEST:

NORMA G. MCGAUGHY

Norma G. McGaughy
City Secretary

APPROVED AS TO FORM:

Elland Archer
City Attorney

EXHIBIT "A"

This property is located on the southeast corner of the intersection of I.635 and Town East Blvd. within the Town East Mall building.

ORDINANCE NO. 1310

AN ORDINANCE OF THE CITY OF MESQUITE, TEXAS, AMENDING CHAPTER 5B, SECTION 7, OF THE CITY CODE BY ESTABLISHING CERTAIN STANDARDS WHEREIN IT SHALL NOT BE UNLAWFUL FOR THOSE UNDER SEVENTEEN (17) YEARS OF AGE TO PLAY OR OPERATE A COIN-OPERATED AMUSEMENT MACHINE.

WHEREAS, certain patrons of major shopping centers desire to leave their children unattended at coin-operated amusement establishments while shopping; and

WHEREAS, coin-operated amusement establishments have been and will be constructed that will accommodate same;

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MESQUITE, TEXAS:

SECTION 1. That Chapter 5-B, Section 7, of the City Code is hereby amended by adding the following, in all other respects to remain in full force and effect:

> "Provided, however, that coin-operated establishments located in major shopping centers containing an enclosed mall and said establishments being operated only during the hours said mall is open and having no outside entrance and where said establishments does not offer for sale or allow the consumption of food, drink or other merchandise, the foregoing provision shall not be applicable and provided, further, that children under seven (7) must be accompanied by an adult."

SECTION 2. That all ordinances, or portions thereof, of the City of Mesquite in conflict with the provisions of this ordinance, to the extent of such conflict are hereby repealed. To the extent that such ordinances or portions

thereof not in conflict herewith, the same shall remain in full force and effect.

SECTION 3. That should any paragraph, sentence, subdivision, clause, phrase, section or provision of this ordinance be adjudged or held to be unconstitutional, illegal, or invalid, the same shall not affect the validity of this ordinance as a whole or any part or provision hereof other than the part so decided to be invalid, illegal, or unconstitutional and shall not affect the validity of the remainder of Section 5-B, Chapter 7, or any other provision of the Code of the City of Mesquite.

SECTION 4. That any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction in the Municipal Court shall be punished by a fine not to exceed Two Hundred Dollars ($200.00) for each offense.

SECTION 5. The fact that the present ordinances of the City of Mesquite are inadequate to properly control these establishments in the City of Mesquite, creates an urgency and an emergency and in the preservation of the public health, safety and welfare and requires that this ordinance shall take effect immediately from and after its passage and publication of said ordinance, as the law in such cases provides.

DULY PASSED AND APPROVED by the City Council of the City of Mesquite, Texas, on the 5th day of April, A.D., 1976.

BOB BEARD

Bob Beard
Mayor

ATTEST:

NORMA G. MCGAUGHY

Norma G. McGaughy
City Secretary

APPROVED AS TO FORM:

Elland Archer
City Attorney

ORDINANCE NO. 1103

AN ORDINANCE OF THE CITY OF MESQUITE, TEXAS, REGULATING AND ESTABLISHING A LICENSE FEE FOR COIN-OPERATED AMUSEMENT MACHINES AND COIN-OPERATED AMUSEMENT ESTABLISHMENTS; PROHIBITING THE OPERATION OR DISPLAY THEREOF WITHOUT A LICENSE; PROHIBITING THE PLAYING OR OPERATION OF COIN-OPERATED AMUSEMENT MACHINES BY PERSONS UNDER SEVENTEEN (17) YEARS; PROVIDING EXCEPTIONS; PROVIDING FOR REVOCATION OF LICENSE; PROVIDING A RIGHT AND MANNER OF APPEAL; PROVIDING CERTAIN DEFINITIONS; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A PENALTY NOT TO EXCEED TWO HUNDRED DOLLARS ($200.00) FOR EACH OFFENSE; AND DECLARING AN EMERGENCY.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MESQUITE, TEXAS:

SECTION 1. It is hereby declared to be unlawful to own, display or operate coin-operated amusement machines or apparatus in the City without a license issued by the City of Mesquite therefor.

SECTION 2. It is hereby declared to be unlawful to own, operate or maintain a coin-operated amusement establishment in the City without a license issued by the City of Mesquite therefor.

SECTION 3. It shall be unlawful for any owner, operator or displayer of coin-operated amusement machines to allow any person under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless such minor is accompanied by a parent or legal guardian.

SECTION 4. *License*: Any person desiring to obtain a license for a coin-operated amusement machine may apply to the Assessor Collector of Taxes of the City of Mesquite on a form to be furnished by the City showing the type of machine to be licensed, serial number, location, name of establishment and name of the owner or person in control of such machine together with the name and title of person making the application if other than the owner.

Upon payment of the license fee the Assessor-Collector shall issue a license which shall be valid for such machine for one (1) year.

Any person desiring to obtain a license for a coin-operated amusement establishment shall apply to the City Secretary by original and five (5) copies, one of which shall be routed to the City Manager, Chief of Police, Chief Building Inspector and City Planner, for review.

Upon approval by each of the parties and payment of the license fee, the City Secretary shall issue a license for such establishment, which shall be valid for one (1) year and shall be non-transferrable.

The Chief of Police shall make his recommendation based upon his own investigation of the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude and connections with criminal elements, taking into consideration the attraction by such establishments of those of tender years.

The Chief Building Inspector and City Planner shall determine compliance with applicable building and zoning ordinances of the City.

When the City Manager has received the recommendations from the Chief of Police, Chief Building Inspector and City Planner, he shall review such application together

with such recommendations as may be furnished and shall approve such application or disapprove same with written notation of his reasons for disapproval.

Upon disapproval, the applicant may make such corrections as noted and request approval, request withdrawal and refund of license fee, or give notice of appeal from the City Manager's decision.

In the event of appeal from the City Manager's decision the applicant shall give written notice of his intention to appeal within ten (10) days of notice of the City Manager's decision. Such appeal shall be heard by the City Council within thirty (30) days from date of such notice unless a later date is agreed upon by applicant.

Upon hearing the Council may reverse the decision of the City Manager in whole or in part or may affirm such decision.

An applicant may appeal such decision to the District Court within thirty (30) days but such appeal shall be upon the substantial evidence rule.

For violation of any of the requirements of this ordinance, the City Manager may upon three (3) days notice of Licensee revoke the license granted hereunder. The same rights of appeal shall exist upon revocation as upon disapproval of the original application.

A person licensed hereunder, by acceptance of such license authorizes the City and its designated personnel to make inspection of the premises, facilities, manner of operation and character of any employee.

The holder of a license hereunder shall comply with all ordinances and requirements of the City of Mesquite and all laws of the State of Texas.

SECTION 5. There is hereby levied a license fee of Ten Dollars ($10.00) for each coin-operated amusement machine and a license fee of One Hundred Dollars ($100.00) for each coin-operated amusement establishment in the City.

The license of a coin-operated amusement establishment shall not exempt the owner or operator from the license fee of individual machines or obediance to any other ordinance of the City of Mesquite, including the prohibition of pool halls.

SECTION 6. *Exceptions*: This ordinance shall not apply to any agency of the United States Government, State of Texas or political subdivision thereof.

Any charitable organization operating or displaying such machines in connection with charitable activities on premises exempt from payment of ad valorem taxes under State law because of such charitable activities shall be exempt from the provisions of this ordinance to such extent.

SECTION 7. *Definitions:* For the purpose of this ordinance the following words and terms are defined as follows:

Coin-Operated Amusement Machine — Means a machine or apparatus that may be played or operated by the insertion of a coin and on which games or tests of skill, chance or ability are played, including pinball machines, and any machine initiating games of sport, shooting, or guiding objects or any machine designed for amusement or relaxation, but not including machines for vending food, drink and tobacco products, music playing or recording or apparatus commonly known as kiddie rides.

Coin-Operated Amusement Establishment — Means any business or commercial establishment or other building or location wherein three (3) or more coin-operated amusement machines are displayed.

SECTION 8. That should any paragraph, sentence, subdivision, clause, phrase, section or provision of this ordinance be adjudged or held to be unconstitutional, illegal, or invalid, the same shall not affect the validity of this ordinance as a whole or any part or provision hereof other than the part so decided to be unconstitutional, illegal or invalid and shall not affect the validity of any other provision of the Code of the City of Mesquite.

SECTION 9. That any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction in Corporation Court shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) for each offense.

SECTION 10. The fact that the City of Mesquite has no adequate ordinance regulating the operation of coin-operated machines or establishments wherein such machines are located in the City creates an urgency and an emergency and in the preservation of the public health, safety and welfare of its citizens requires that this ordinance shall take effect immediately from and after its passage and the publication of the caption as the law and charter in such cases provide.

DULY PASSED AND APPROVED by the City Council of the City of Mesquite, Texas, on the 19th day of March, A.D., 1973.

GEORGE BOYCE

George Boyce
Mayor

ATTEST:

NORMA G. MCGAUGHY

Norma G. McGaughy
City Secretary

APPROVED AS TO FORM:

ELLAND ARCHER

Elland Archer
City Attorney

ORDINANCE NO. 1353

AN ORDINANCE OF THE CITY OF MESQUITE, TEXAS, REPEALING ORDINANCE NUMBER 1310 OF THE CITY OF MESQUITE AND AMENDING ORDINANCE 1103 OF THE CITY OF MESQUITE BY PROVIDING REGULATION OF AND ESTABLISHING A LICENSE FEE FOR COIN-OPERATED AMUSEMENT ESTABLISHMENTS; PROHIBITING THE PLAYING OR OPERATION OF COIN-OPERATED AMUSEMENT MACHINES BY PERSONS UNDER SEVENTEEN (17) YEARS; PROVIDING EXCEPTIONS; PROVIDING FOR REVOCATION OF LICENSE; PROVIDING A RIGHT AND MANNER OF APPEAL; PROVIDING CERTAIN DEFINITIONS; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A PENALTY NOT TO EXCEED TWO HUNDRED DOLLARS ($200.00) FOR EACH OFFENSE; AND DECLARING AN EMERGENCY.

WHEREAS, coin-operated amusement establishments have a tendency to attract patrons of tender years, and

WHEREAS, the congregation of youthful patrons creates problems of policing due to the need to protect such patrons from the influences of those who would promote gambling, sale of narcotics and other unlawful activities; and

WHEREAS, it is vital to the safety and welfare of the inhabitants of the City of Mesquite and particularly those of tender years for whom a special duty is imposed upon the governing body to protect, that proper and suitable operators only are licensed to operate coin-operated amusement establishments and that such establishments be regulated to that end; and

WHEREAS, it has been determined that the attraction of such establishment for those under seventeen (17) years of

age is detrimental to such persons and to the health and welfare of the inhabitants of the City, generally.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MESQUITE, TEXAS:

SECTION 1. That Ordinance Number 1310 of the City of Mesquite passed on the 5th day of April, 1976, is hereby repealed.

SECTION 2. That Ordinance 1103 is hereby amended to read as follows:

SECTION 3. It is hereby declared to be unlawful to own, display or operate coin-operated amusement machines or apparatus in the City without a license issued by the City of Mesquite therefor.

SECTION 4. It is hereby declared to be unlawful to own, operate or maintain a coin-operated amusement establishment in the City without a license issued by the City of Mesquite therefor.

SECTION 5. It shall be unlawful for any owner, operator or displayer of coin-operated amusement machines to allow any person under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless such minor is accompanied by a parent or legal guardian.

SECTION 6. *License:* Any person desiring to obtain a license for a coin-operated amusement machine may apply to the Assessor Collector of Taxes of the City of Mesquite on a form to be furnished by the City showing the type of machine to be licensed, serial number, location, name of establishment and name of the owner or person in control of such machine together with the name and title of person making the application if other than the owner.

Upon payment of the license fee the Assessor-Collector shall issue a license which shall be valid for such machine for one (1) year.

Any person desiring to obtain a license for a coin-operated amusement establishment shall apply to the City Secretary by original and five (5) copies, one of which shall be routed to the City Manager, Chief of Police, Chief Building Inspector and City Planner, for review.

Upon approval by each of the parties and payment of the license fee, the City Secretary shall issue a license for such establishment, which shall be valid for one (1) year and shall be non-transferrable.

The Chief of Police shall make his recommendation based upon his investigation of the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude and connections with criminal elements, taking into consideration the attraction by such establishments of those of tender years.

The Chief Building Inspector and City Planner shall determine compliance with applicable building and zoning ordinances of the City.

When the City Manager has received the recommendations from the Chief of Police, Chief Building Inspector and City Planner, he shall review such application together with such recommendations as may be furnished and shall approve such application or disapprove same with written notation of his reasons for disapproval.

Upon disapproval, the applicant may make such corrections as noted and request approval, request withdrawal and refund of license fee, or give notice of appeal from the City Manager's decision.

In the event of appeal from the City Manager's decision the applicant shall give written notice of his intention to appeal within ten (10) days of notice of the City Manager's

decision. Such appeal shall be heard by the City Council within thirty (30) days from date of such notice unless a later date is agreed upon by applicant.

Upon appeal to the City Council of the City Manager's decision based upon an adverse recommendation by the Chief of Police as to applicant's character, the applicant shall have the same burden as prescribed in Article 305, V.A.C.S. to show to the Council that he or it is of good character as a law abiding citizen to such extent that a license should be issued.

Upon hearing the Council may reverse the decision of the City Manager in whole or in part or may affirm such decision.

An applicant may appeal such decision to the District Court within thirty (30) days but such appeal shall be upon the substantial evidence rule.

For violation of any of the requirements of this ordinance, the City Manager may upon three (3) days notice of Licensee revoke the license granted hereunder. The same rights of appeal shall exist upon revocation as upon disapproval of the original application.

A person licensed hereunder, by acceptance of such license authorizes the City and its designated personnel to make inspections of the premises, facilities, manner of operation and character of any employee.

The holder of a license hereunder shall comply with all ordinances and requirements of the City of Mesquite and all laws of the State of Texas.

SECTION 7. There is hereby levied a license fee of Ten Dollars ($10.00) for each coin-operated amusement machine and a license fee of One Hundred Dollars ($100.00) for each coin-operated amusement establishment in the City.

The license of a coin-operated amusement establishment shall not exempt the owner or operator from the license fee of individual machines or obedience to any other ordinance of the City of Mesquite, including the prohibition of pool halls.

SECTION 8. *Exceptions:* This ordinance shall not apply to any agency of the United States Government, State of Texas or political subdivision thereof.

Any charitable organization operating or displaying such machines in connection with charitable activities on premises exempt from payment of ad valorem taxes under State law because of such charitable activities shall be exempt from the provisions of this ordinance to such extent.

SECTION 9. *Definitions:* For the purpose of this ordinance the following words and terms are defined as follows:

Coin-Operated Amusement Machine — Means a machine or apparatus that may be played or operated by the insertion of a coin and on which games or tests of skill, chance or ability are played, including pinball machines, and any machine initiating games of sport, shooting, or guiding objects or any machine designed for amusement or relaxation, but not including machines for vending food, drink and tobacco products, music playing or recording or apparatus commonly known as kiddie rides.

Coin-Operated Amusement Establishment — Means any business or commercial establishment or other building or location wherein three (3) or more coin-operated amusement machines are displayed.

Connection With Criminal Elements is defined as that state of affairs wherein an applicant, or an officer of, principal stockholder of, person having a substantial interest in

or management responsibility for, a corporation or other organization wherein such organization is the applicant, directly or as parent, subsidiary or affiliate, has such association, acquaintance, or business association with parties having been convicted of a felony or crime involving moral turpitude or are otherwise involved in unlawful activities, whether convicted or not, to the extent that the fencing of stolen merchandise or illegally obtained funds, the procurring of prostitutes, the transfer or sale of narcotics or illegal substances is made more feasible or likely or the protection of those of tender years from such unwholesome influences are rendered more difficult.

A determination by the United States Department of Justice that a party is a member of the "mafia" or "Cosa Nostro" family or that such party is engaged in or affiliated with a nationwide crime organization, whether formally or informally, shall be prima facie evidence, so far as the issuance of a license hereunder, that such person has "connections with criminal elements" and constitute, within the meaning of this ordinance, "criminal elements".

Character as a law abiding citizen shall mean substantially that standard employed by the Supreme Court of the State of Texas in the licensing of attorneys as set forth in Articles 305 and 306, Vernon's Annotated Civil Statutes but expressly excludes conviction by any parties of traffic violations of a Class C misdemeanor grade.

Section 10. *Legislative Policy:* It is the policy of the City of Mesquite, in the enforcement and interpretation of this ordinance, to discourage and prohibit the operation, control or interference in the operation of coin-operated amusement facilities by organized crime.

The attraction by the vending industry in general and amusement facilities in particular of criminal elements of our society is recognized and such is determined to be con-

trary to the welfare of the inhabitants of the City of Mesquite.

SECTION 11. That should any paragraph, sentence, subdivision, clause, phrase, section or provision of this ordinance be adjudged or held to be unconstitutional, illegal, or invalid, the same shall not affect the validity of this ordinance as a whole or any part or provision hereof other than the part so decided to be unconstitutional, illegal or invalid and shall not affect the validity of any other provision of the Code of the City of Mesquite.

SECTION 12. That any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction in Corporation Court shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) for each offense.

SECTION 13. The fact that the City of Mesquite has no adequate ordinance regulating the operation of coin-operated machines or establishments wherein such machines are located in the City creates an urgency and an emergency and in the preservation of the public health, safety and welfare of its citizens requires that this ordinance shall take effect immediately from and after its passage and the publication of the caption as the law and charter in such cases provide.

DULY PASSED AND APPROVED by the City Council of the City of Mesquite, Texas, on the 7th day of February , A.D., 1977.

Vernie G. Erwin
Mayor Pro Tem

ATTEST:

Norma G. McGaughy
City Secretary

APPROVED AS TO FORM:

Elland Archer
City Attorney

NO. 76-9329-D

ALADDIN'S CASTLE, INC.,

Plaintiff

v.

THE CITY OF MESQUITE

Defendant

IN THE DISTRICT COURT
OF DALLAS COUNTY, TEXAS
95TH JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION AND APPLICATION FOR A MANDATORY PERMANENT INJUNCTION

TO THE HONORABLE JUDGE OF SAID COURT:

COMES Now Aladdin's Castle, Inc., hereinafter called plaintiff, complaining of the City of Mesquite, hereinafter called defendant, acting by and through its City Manager, City Secretary, City Attorney, Chief of Police, Chief Building Inspector, City Planner, Mayor, and City Council, in this Plaintiff's Original Petition and Application for a Mandatory Permanent Injunction, and for cause of action would show the court as follows:

I.

Plaintiff is a corporation duly incorporated and validly existing under the laws of the State of Delaware and has been issued a Certificate of Authority by the State of Texas as a foreign corporation to transact business in this State, and defendant is a municipal corporation incorporated under the laws of the State of Texas located within Dallas County, Texas, which may be served with this petition

and process at the City of Mesquite Municipal Building, 711 North Galloway, Mesquite, Texas, by serving its Mayor, Bob Beard, or its City Secretary, Norma G. McGuaghy.

II.

Plaintiff entered into that certain Lease Agreement dated January 12, 1974, with Homart Development Co., a Delaware corporation, as lessor, and Plaintiff as lessee, covering certain premises known as 2082 Town East Mall, Mesquite, Texas, which lease is for a term of ten years at a monthly rental of $2,433.75. The plaintiff leased the above-mentioned premises in Town East Mall for the express purpose of conducting therein a coin-operated amusement establishment and for this purpose plaintiff expended approximately $80,000.00 in preparing its premises for business, all with the knowledge and encouragement of defendant.

III.

Defendant, the City of Mesquite, enacted Ordinance No. 1103 on March 19, 1973, which ordinance requires, *inter alia*, a license for coin-operated amusement establishments. Plaintiff notified defendant during January, 1976, that it desired to conduct its business in Town East Mall, Mesquite, Texas, and requested that defendant adopt a zoning change to permit plaintiff to operate in Town East Mall and amend the provisions of Ordinance No. 1103 so as to permit persons under seventeen years of age to operate and play plaintiff's coin-operated amusement machines. Pursuant to plaintiff's above-mentioned requests of defendant, Ordinances No. 1310 and No. 1314 were enacted on April 5, 1976, to encourage plaintiff to locate within the City of Mesquite and conduct its business in Town East Mall. Ordinance No. 1310 specifically amended Ordinance

No. 1103 so as to permit persons under seventeen years of age to operate and play coin-operated amusement machines such as plaintiff's and to permit persons under seven years of age to operate and play such machines if accompanied by an adult, if such machines were controlled by a coin-operated amusement establishment located within a major shopping center such as plaintiff's premises in Town East Mall. Ordinance No. 1314 was enacted to adopt a zoning change to grant to plaintiff a "conditional use designation for an indoor commercial recreation for coin-operated amusement machines within Town East Mall."

IV.

Pursuant to defendant's Ordinance No. 1103, plaintiff heretofore duly obtained a license application from the City Secretary for a coin-operated amusement establishment and submitted such application properly completed to defendant. However, on July 20, 1976, the City Manager advised plaintiff that pursuant to Ordinance No. 1103 he was disapproving plaintiff's license application based upon an unfavorable recommendation by the Chief of Police. On July 23, 1976, plaintiff through counsel notified the City Council that pursuant of Ordinance No. 1103 plaintiff desired to appeal the City Manager's decision to the City Council. The City Council heard plaintiff's appeal, and on August 16, 1976, the City Council refused to reverse the City Manager's decision and denied plaintiff's license application.

V.

Plaintiff alleges that as a result of the City Council's decision defendant, by virtue of Ordinance No. 1103, has prohibited and refused and still prohibits and refuses to allow plaintiff to operate a coin-operated amusement establishment at plaintiff's premises in Town East Mall, Mesquite, Texas.

VI.

Plaintiff alleges that the action of defendant is unlawful, illegal and void in that the action aforesaid and the city ordinance is in violation of and repugnant to federal and state constitutions pertaining to due process of law and more particularly being in violation of Article I, Section 19, of the Constitution of the State of Texas.

VII.

In connection with the foregoing, plaintiff would show the Court that said Ordinance No. 1103 is prohibitory and deprives plaintiff of its property and privileges without due process of law by reason of said Ordinance No. 1103 being vague, overbroad and indefinite in so far as such ordinance permits the denial of a license on the basis of the statutory standard that the applicant has "connections with criminal elements" when such ordinance fails to define the limits of the word "connections" or what constitutes "criminal elements" and that such ordinance, even if valid on its face, is in its application to plaintiff arbitrary, capricious, unreasonable, unlawful and as applied to plaintiff predicated upon no competent and credible evidence, and as such constitutes a clear abuse by the defendant of the powers and discretion entrusted to it by law.

VIII.

Plaintiff further alleges that Ordinance No. 1103 is in violation and repugnant to Article 1165 and Article 1175 of the Texas Revised Civil Statutes and of Article 11, Section 5, of the Constitution of the State of Texas.

IX.

In connection with the foregoing, plaintiff would show the Court that the action of the Chief of Police of the City

Mesquite in making a negative recommendation upon plaintiff's license application, the action of the City Manager in accepting such recommendation and refusing to issue a license to Plaintiff, and the action of the City Council in accepting such recommendation and refusing to reverse the decision of the City Manager not to issue a license to plaintiff is arbitrary, capricious, unreasonable and unsupported by any competent evidence, and constitutes a clear abuse by defendant of the powers and discretion entrusted to it by law.

X.

Plaintiff alleges and would show the Court that the operation of a coin-operated amusement establishment is legal and recognized by the legislature of the State of Texas by the terms of Texas Revised Civil Statutes Taxation-General Art. 13.01 et seq. (1976), and as such plaintiff alleges that it has the right to operate its business so long as plaintiff has complied with all valid statutes, regulations and ordinances applicable to plaintiff's business. Plaintiff further alleges that it has complied with the applicable provisions of all statutes, regulations and ordinances, including defendant's Ordinance No. 1103, but that defendant has denied plaintiff a license to conduct its business, which denial is arbitrary, capricious, unreasonable, unlawful and unsupported by any competent evidence, and constitutes a clear abuse by defendant of the powers and discretion entrusted to it by law.

XI.

Defendant's Ordinance No. 1103 specifically provides that license applicants such as plaintiff who have been denied a license by the City Council may appeal such denial within thirty days to the district court. In addition to all of the foregoing allegations, plaintiff hereby appeals the decision of the City Council to deny plaintiff a license

to this Court on the basis that such administrative decision of the City Council was an arbitrary, capricious, unreasonable and unlawful abuse of the discretion vested in the City Council by Ordinance 1103, as the plaintiff alleges that the discretion of the City Council was exercised in an arbitrary, capricious, unlawful and unreasonable manner without any competent and credible evidence that would have justified the City Council in denying plaintiff's license application.

XII.

Plaintiff alleges that by reason of the aforesaid actions on the part of the defendant, acting by and through its City Manager, Chief of Police and City Council, the plaintiff has been unlawfully deprived of its right and privilege to operate a legal business, has been irreparably injured and damaged and has no adequate remedy at law. Furthermore, plaintiff believes that the defendant, acting through its City Manager, Chief of Police and City Council, will enforce Ordinance No. 1103 and/or otherwise prohibit plaintiff to operate its business, as a result of which plaintiff will be further irreparably injured and damaged. Since plaintiff has no adequate remedy at law, even should this Court reverse the decision of the City Council, unless this Court grants plaintiff a permanent mandatory injunction commanding defendant to issue its license to plaintiff and further permanently restraining defendant, acting by and through its City Manager, Chief of Police and City Council, from enforcing Ordinance No. 1103's licensing provisions and/or otherwise prohibiting plaintiff from operating its business, plaintiff will be further irreparably injured and damaged in that plaintiff will be unable to operate its business of a coin-operated amusement establishment and collect income therefrom to protect its property rights and privileges and pursue a lawful and legal business. Plaintiff requests that a time

certain be set for hearing of this cause so that the City Manager, Chief of Police and City Council of Mesquite, Texas, can show cause why a permanent injunction should not be granted.

WHEREFORE, PREMISES CONSIDERED, plaintiff prays that defendant be ordered to issue its license to plaintiff pursuant to a mandatory injunction, and permanently restrained from enforcing Ordinance 1103's license provisions and from prohibiting plaintiff from operating its business at 2082 Town East Mall, Mesquite, Texas, and that defendants be issued notice to appear and show cause why at the hearing of this cause that said ordinance should not be held to be unconstitutional and void as applied to plaintiff, and/or that the action of defendant be reversed and for all other and further relief, both general and special, at law and in equity to which plaintiff may be justly entitled and for all costs of suit thereby incurred.

JOHNSON, BROMBERG, LEEDS & RIGGS
Attorney for Plaintiff

By LOUIS P. BICKEL

Louis P. Bickel

THE STATE OF ILLINOIS
COUNTY OF COOK

On this the 3d day of September, 1976, before me, the undersigned authority, personally appeared Jules Millman, known to me to be the person and officer of Aladdin's Castle, Inc. whose signature is subscribed hereto, and after first by me being duly sworn, upon his oath deposed and says that he is an officer of the plaintiff corporation in the above-styled and numbered cause, and that he has

read the foregoing Plaintiff's Original Petition and Application for Permanent Injunction and that the facts and allegations set out therein are true and correct.

JULES MILLMAN

Affiant

SUBSCRIBED AND SWORN to before me this 3d day of September, 1976.

Notary Public in and for
Cook County, Illinois

NO. 76-9329-D

ALADDIN'S CASTLE, INC.,

Plaintiff,

v.

THE CITY OF MESQUITE,

Defendant.

IN THE DISTRICT COURT
OF DALLAS COUNTY, TEXAS
95TH JUDICIAL DISTRICT

FINAL JUDGMENT

BE IT REMEMBERED that on the 13th day of January, 1977 came on to be heard the above styled and numbered cause and came the Plaintiff Aladdin's Castle, Inc. by and through its attorney or record and by its representative and came the Defendant The City of Mesquite by and through its attorney of record and its representative and announced that they were ready for trial. Both sides stated that the case would be presented to the Court without the intervention of a jury.

Thereupon the Court proceeded to hear and consider the pleadings, the evidence, the stipulations of the parties, the arguments of counsel, and the law to be applied thereto.

In consideration of all of the above, the Court is of the opinion that the Plaintiff, Aladdin's Castle, Inc., should be granted judgment and a Mandatory Permanent Injunction herein.

The Court is of this opinion because, as a matter of law, it concludes that Ordinance No. 1103 of the City of Mesquite is in violation of and repugnant to the 14th Amendment to the Constitution of the United States and is in

violation of and repugnant to Article 1, Section 19 of the Constitution of the State of Texas to the extent that in Section 4 of such ordinance it uses the words, "and connection with criminal elements," in that such words as used in such ordinance are so vague, general, and indefinite that the use of same tends to and does deny the Plaintiff, Aladdin's Castle, Inc., due process of law.

Further under the testimony of this case and in consideration of all the facts before the Court, the Court concludes as a matter of law that the decision of the City Council of the City of Mesquite upon which this appeal and trial was based was not supported by substantial evidence and that as a matter of law from all evidence before this Court no substantial evidence exists tending to show that Aladdin's Castle, Inc. has any connections with criminal elements. As a matter of fact, I make the same conclusion.

Further, in addition, this Court finds that Plaintiff, Aladdin's Castle, Inc., has proven that no substantial evidence exists from the evidence presented before this Court that would support the decision of the City of Mesquite.

It is therefore hereby ORDERED, ADJUDGED, AND DECREED that the disapproval of the Application by the City Manager of The City of Mesquite on the 20th day of July, 1976 denying issuance to Aladdin's Castle, Inc. of a license to operate a coin-operated amusement establishment at Town East Shopping Center, Mesquite, Texas be and it is hereby set aside and held for naught.

It is further ORDERED, ADJUDGED, AND DECREED that the decision of the City Council of August 16, 1976 affirming the conduct of the City Manager in his disapproval of the Application be and it is hereby set aside and held for naught in that such decision by the City Council was not based upon substantial evidence either at the hearing before the Council on August 2, 1976 or on August 16, 1976 or in the

evidence presented in the trial of this cause.

It is further ORDERED, ADJUDGED, AND DECREED that the City Secretary issue a license to Aladdin's Castle, Inc. permitting it to operate a coin-operated amusement establishment at Town East Shopping Center in accordance with its July 2, 1976 Application and at the location stated therein in accordance with Ordinance No. 1103 of the City of Mesquite, Texas, except that the only remaining act to be accomplished by any of the Defendants hereto is the ministerial act of issuing such license under such ordinance.

It is finally ORDERED, ADJUDGED, AND DECREED that the command of this judgment be carried out immediately by the officials of the City of Mesquite and that the City Secretary immediately issue such license to Aladdin's Castle, Inc. upon presentation of a certified copy of this Order by any representative of Aladdin's Castle, Inc. including Glenn A. Portman of the law firm of Johnson, Bromberg, Leeds & Riggs of Dallas, Texas. I further rule that Plaintiff not be required to post a bond in any amount and that it have and recover its costs herein expended.

RENDERED AND ENTERED this 14th day of January, 1977.

/s/ CLAUDE WILLIAMS

Judge

RETIRED JUDGE SITTING
FOR JUDGE 95th JUDICIAL
DISTRICT COURT OF
DALLAS COUNTY, TEXAS

CLERK'S CERTIFICATE

THE STATE OF TEXAS }
COUNTY OF DALLAS }

I, BILL SHAW, Clerk of the District Courts of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of FINAL JUDGMENT in Cause No. 76-9329-D, entitled ALADDIN'S CASTLE, INC. vs. THE CITY OF MESQUITE as the same appears of record in my office in Vol. D-44, Page 158, Minutes of the District Court of Dallas County, for the D-95th Judicial District of Texas.

GIVEN UNDER MY HAND AND SEAL of said Court, at office in Dallas, Texas, this the 14th day of January, A.D. 1977.

BILL SHAW
Clerk of the District Courts,
Dallas County, Texas

By GAILYN JONES, Deputy
Gailyn Lanell Jones

CITY OF MESQUITE

January 31, 1977

Mr. Louis P. Bickel
Johnson, Bromberg, Leeds & Riggs
211 N. Ervay, #1500
Dallas, Texas 75201

Re: Aladdin's Castle, Inc. vs. City of Mesquite
No. 76-9329-D

Dear Mr. Bickel:

As per our telephone conversation, I have given notice of appeal in the above case but not a notice to supersede the judgment.

Although there is authority to the effect that an appeal by a City automatically supersedes the judgment, it is my understanding that notice of intent to supersede the judgment is required.

At any rate, the permit has been issued, subject to a decision on appeal, and I see no reason why your client cannot operate pending the appeal.

I do wish to emphasize that the issuance of the permit does not render the controversy moot as the permit was issued only in compliance with an order of the district court.

While I believe that the court exceeded its powers in issuing a mandatory injunction, and could only have enjoined the City from enforcement of the Ordinance, we would not risk defying a district court order, but shall argue the point on appeal.

Plaintiff's Exhibit 5

Please be advised, however, that should we prevail on appeal, we shall consider the permit issued pursuant to the void order void as of the date of the Order of the appellate court and that no revocation proceedings are necessary.

Even should the appellate court hold that you are entitled to a permit under the substantial evidence rule as the Ordinance expressly provides, but that the mandatory injunction was beyond the power of the trial court, we will consider the permit issued void and require a new permit unless the appellate court decrees to the contrary, since the permit issued was only issued pursuant to the orders of the District Court.

In answer to your specific question, no criminal complaint will be filed for operating while the Order of District Court remains in effect.

I trust that this answers all questions regarding the position of the City of Mesquite. We have too much respect for the District Court to act contrary to its orders even when we consider such orders void.

Sincerely,

ELLAND ARCHER

Elland Archer
City Attorney

CC: Norma McGaughy

City Secretary

NO. 76-9329-D

ALADDIN'S CASTLE, INC.

Plaintiff

v.

THE CITY OF MESQUITE,

Defendant

IN THE DISTRICT COURT
OF DALLAS COUNTY, TEXAS
95TH JUDICIAL DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The undersigned, as Judge sitting for the Judge of the 95th Judicial District Court of Dallas County, Texas, after hearing all of the evidence presented by the parties to the above styled and numbered cause on the 13th and 14th days of January, 1977, and after their rendition of Judgment in such cause in favor of Plaintiff on the 14th day of January, 1977, hereby files with the clerk of the 95th Judicial District Court his Findings of Fact and Conclusions of Law as requested by the Defendant on the 20th day of January, 1977, so that such Findings of Fact and Conclusions of Law shall constitute a part of the record.

I.

FINDINGS OF FACT

1. That Defendant enacted Ordinance No. 1103 on March 19, 1973, and that such ordinance required, *inter alia*, a license for coin-operated amusement establishments and contained in section four thereof the following language:

Plaintiff's Exhibit 6

"The chief of police shall make his recommendation based upon his investigation of the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude and connections with criminal elements, taking into consideration the attraction by such establishments of those of tender years."

2. That Defendant enacted Ordinance No. 1310 on April 5, 1976, at the request of Plaintiff so as to amend Ordinance No. 1103 so as to permit persons under the age of seventeen (17) years but not under the age of seven (7) years to operate coin-operated amusement machines in establishments located entirely within enclosed shopping malls, Ordinance 1103 prior to such amendment having prohibited all persons under the age of seventeen (17) years to operate any coin-operated amusement machines.

3. That Defendant enacted Ordinance No. 1314 on April 5, 1976, at the request of Plaintiff so as to grant to Plaintiff a conditional use designation for an indoor commercial recreation for coin-operated amusement machines within Town East Mall.

4. That pursuant to Defendant's Ordinance No. 1103, Plaintiff duly submitted its application, properly completed, for a license to operate a coin-operated amusement establishment in Town East Mall, Mesquite, Texas, but that on July 20, 1976, Defendant gave notice to Plaintiff that the license was denied based upon an unfavorable recommendation of Defendant's Chief of Police.

5. That on July 23, 1976, Plaintiff notified Defendant that pursuant to Ordinance 1103, Plaintiff desired to appeal Defendant's decision to Defendant's City Council.

6. That on August 2, 1976, Defendant's City Council held a public meeting at which Plaintiff presented its case for a

license, and Defendant presented its case for denial of such license and that after an adjournment, the City Council on August 16, 1976, affirmed the decision of Defendant to deny Plaintiff a license to operate a coin-operated amusement establishment in Town East Mall, Mesquite, Texas.

7. That on September 10, 1976, Plaintiff filed its Original Petition and Application for a Mandatory Permanent Injunction within the time period allowed for an appeal pursuant to Defendant's Ordinance No. 1103 to the district court.

8. That the only reason for Defendant's denial of a license to Plaintiff was because Defendant's City Manager and City Council, acting upon the recommendation of Defendant's police department, found as a fact that Plaintiff's parent company, Bally Manufacturing Company, owned 100% of Plaintiff's stock and was "connected with criminal elements".

9. That Bally Manufacturing Company and its President, Mr. William T. O'Donnell, were indicted, along with others, in the United States District Court for the Eastern District of Louisiana, New Orleans Division, in Criminal Docket No. 74-530, under an indictment charging violations of Title 18 U.S.C. §§ 371, 1952, 1955 and 2 concerning conspiracy, interstate travel and transportation in aid of racketeering enterprises and operation of illegal gambling business.

10. That Bally Manufacturing Company and its President were tried and acquitted of the crimes charged under the indictment referred to in finding number 9 above.

11. That Bally Manufacturing Company is not owned or controlled by nor does it have any business relationships with Emprise Corporation and that none of Bally Manufacturing Company's officers or directors are owned or con-

trolled by Emprise Corporation nor do they have any business relationships with Emprise Corporation.

12. That Bally Manufacturing Company is not owned or controlled by nor does it have any business relationships with Irving Kaye, and that none of Bally Manufacturing Company's officers or directors are owned or controlled by Irving Kaye nor do they have any business relationships with Irving Kaye.

13. That Bally Manufacturing Company is not owned or controlled by nor does it have any business relationships with Abe Green, and that none of Bally Manufacturing Company's officers or directors are owned or controlled by Abe Green nor do they have any business relationships with Abe Green.

14. That Gerardo Catina has no ownership interest in Bally Manufacturing Company, nor is he an officer or director of Bally Manufacturing Company, nor does he in any manner control or direct the actions of Bally Manufacturing Company.

15. That Gerardo Catina has no relationship with any officer or director of Bally Manufacturing Company.

16. That no substantial evidence exists, and, in fact, no evidence exists whatsoever to prove that Bally Manufacturing Company is controlled or directed by or connected with any criminal elements of any kind whatsoever.

II.

CONCLUSIONS OF LAW

1. I conclude as a matter of law that Ordinance No. 1103 of the City of Mesquite insofar as it contains the following language in section four thereof:

> "The chief of police shall make his recommendation based upon his investigation of the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions and felonies and crimes involving moral turpitude and connections with criminal elements, taking into consideration the attraction by such establishments of those of tender years."

is in violation of and repugnant to the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 19 of the Constitution of the State of Texas, and that by enacting such provisions of Ordinance 1103, Defendant exceeded the powers granted to it by Article 11, Section 5 of the Constitution of the State of Texas and Texas Revised Civil Statutes, Articles 1165 and 1175, for the reason that the words "connections with criminal elements" used in the language of such Ordinance are vague, indefinite and overbroad. I conclude that "connections with criminal elements" is vague and indefinite for the reason that such language fails to appraise an applicant of what may constitute forbidden "connections" or what may constitute "criminal elements". I further conclude that "connections with criminal elements" is void for the reason that such term is overbroad in that the word "connections" sweeps within its meaning conduct and associations that are lawful, it being my conclusion that the word "connections" may be no broader than control over an applicant to be lawful and that in this matter, Defendant has used "connections" to mean any remote associations.

2. I conclude as a matter of law that if the term "connections with criminal elements" is constitutional that Plaintiff has proven that no competent evidence exists to support the Defendant's denial of Plaintiff's license on the basis that Bally Manufacturing Company is "connected

with criminal elements", and therefore, I conclude that Defendant's action in denying Plaintiff its license was unreasonable, arbitrary and capricious and unsupported by any substantial evidence.

CLAUDE WILLIAMS

Claude Williams, *Judge*
Retired Judge Sitting for
Judge, 95th Judicial District
Court of Dallas County, Texas

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action
No. 77-0194-C

ALADDIN'S CASTLE, INC.
vs.
THE CITY OF MESQUITE

PRELIMINARY INJUNCTION

BE IT REMEMBERED THAT on the 18th day of March, 1977 came on to be heard upon application for Preliminary Injunction Plaintiff's Verified Complaint for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction. After considering the pleadings, the evidence, the arguments of counsel and the briefs submitted by the parties, the Court is of the opinion that the Temporary Restraining Order heretofore entered in the above styled and numbered civil action should become a Preliminary Injunction until such time as this matter should be heard upon application for Permanent Injunction and trial upon the merits.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT the Temporary Restraining Order heretofore entered in the above styled and numbered civil action be and is hereby made a Preliminary Injunction upon the same terms and conditions as the heretofore entered Temporary Restraining Order to remain in effect until the entry of judgment upon trial upon Permanent Injunction, with the bond heretofore set and made to remain the same until further order of the Court.

RENDERED AND ENTERED this 21st day of March, 1977.

WILLIAM M. TAYLOR

William M. Taylor
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(Caption Omitted in Printing)

MOTION TO FILE SUPPLEMENTAL COMPLAINT

COMES Now Aladdin's Castle, Inc., Plaintiff herein, and moves the Court for leave to file a Supplemental Complaint in this cause in the form attached hereto as Exhibit "A". Such exhibit is made a part hereof for all purposes.

This motion is made solely to serve the ends of justice and not as to cause delay in this matter. The Supplemental Complaint merely raises an issue of law as to the Amended Ordinance 1353. Such issue of law — whether Ordinance 1353 is unconstitutionally vague — has been briefed and litigated in the State Court action in connection with Ordinance 1103, which such ordinance was the predecessor of Ordinance 1353. Therefore, the matter raised by the Supplemental Complaint would in no way delay the trial of this cause and would in no way constitute suprise to the Defendant.

WHERETOFORE, PREMISES CONSIDERED, the Plaintiff prays that this Motion be granted and that it be allowed to file and serve its Supplemental Complaint.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(Caption Omitted in Printing)

SUPPLEMENTAL COMPLAINT

COMES NOW Aladdin's Castle, Inc., Plaintiff herein, and for its supplemental cause of action would show the Court the following, to wit:

1. That Defendant enacted Ordinance 1353 on February 7, 1977 and that such ordinance required, *inter alia*, a license for coin-operated amusement establishments and contained in § 6 thereof the following language:

> "The Chief of Police shall make his recommendation based upon his investigation of the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude and connections with criminal elements, taking into consideration the attraction by such establishment of those of tender years."

The Ordinance goes on, in § 9, to define "connection with criminal elements" as follows:

> "*Connection With Criminal Elements* is defined as that state of affairs wherein an applicant, or an officer of, principal stockholder of, person having a substantial interest in or management responsibility for, a corporation or other organization wherein such organization is the applicant, directly or as parent, subsidiary or affiliate, has such association, acquaintance, or business association with parties having been convicted of a felony or crime involving moral turpitude or are otherwise involved in unlawful activities,

whether convicted or not, to the extent that the fencing of stolen merchandise or illegally obtained funds, the procurring of prostitutes, the transfer or sale of narcotics or illegal substances is made more feasible or likely or the protection of those of tender years from unwholesome influences are rendered more difficult.

A determination by the United States Department of Justice that a party is a member of the "mafia" or "Cosa Nostro" family or that such party is engaged in or affiliated with a nationwide crime organization, whether formally or informally, shall be prima facia evidence, so far as the issuance of a license hereunder, that such person has "connections with criminal elements" and constitute, within the meaning of this ordinance, "criminal elements."

2. The above quoted language — "connections with criminal elements" and the accompanying definition thereof — is in violation of and repugnant to the Due Process Clause of the 14th Amendment of the United States Constitution and in Article I, § 9, of the Constitution of the State of Texas, and that by enacting such provisions of Ordinance 1353, the Defendant exceeded the powers granted to it by Article 11, § 5, of the Constitution of the State of Texas and Texas Revised Civil Statutes, Articles 1165 and 1175, for the reason that the words "connections with criminal elements" and the accompanying definition thereof are vague, indefinite, and overboard. The phrase "connection with criminal elements" and the accompanying definition thereof are vague and indefinite for the reason that such language fails to apprise an applicant of what may constitute forbidden "connections" or what may constitute "criminal elements." Further, such phrase and accompanying definition are void for the reason that such term and accompanying definition are overboard in that the word

"connections" and the accompanying definition sweeps within its meaning conduct and associations that are lawful.

Further, the phrase "connection with criminal elements" and the accompanying definition thereof are unconstitutionally vague and overboard in that they would cause men of ordinary intelligence to guess as to the meaning of such ordinance and differ as to such meaning.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that this Court grant the following relief, to wit:

a. Upon final hearing of this cause, grant a Permanent Injunction prohibiting the City of Mesquite and all of its officials from in any way enforcing Sections 5, 6 and 9 of Ordinance No. 1353 with respect to Plaintiff and its facility located at Town East Mall, Mesquite, Dallas County, Texas.

b. That this Court enter a Declaratory Judgment declaring that Ordinance No. 1353 is void and unconstitutional inasmuch as it is unconstitutionally vague, and inasmuch as the Ordinance and the enforcement thereof has the effect of depriving Plaintiff of its property without due process of law and depriving Plaintiff of equal protection under the law; and that the City is estopped to enforce Ordinance No. 1353 as against Plaintiff.

c. Order the City of Mesquite to pay the Plaintiff its Costs of Court herein expended.

d. That the Court grant Plaintiff such other and further relief, both general and special, at law or in equity, to which the Plaintiff may show itself to be justly entitled.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(Caption Omitted in Printing)

REPLY TO MOTION TO FILE SUPPLEMENTAL COMPLAINT

TO THE HONORABLE COURT:

Comes now the City of Mesquite, Texas, Defendant herein, and respectfully opposes Plaintiff's Motion to File Supplemental Complaint for the following reasons:

1. Such motion filed four days prior to the trial setting is not timely.

The complained of ordinance was passed four months ago and Plaintiff has waited until the week of trial (six days after the original setting) to ask leave to amend.

2. The requested amendment injects new matter in the suit and involves a separate ground of relief in no manner connected with the original relief sought. Defendant is ill prepared to defend upon such new ground upon such short notice.

3. The proposed amendment does not allege a case or controversy. *Golden v. Zurickler,* 394 U.S. 104, 89 S.Ct. 956 (1969).

4. The proposed amendment does not indicate standing of Plaintiff to raise such issue.

5. No irreparable injury is alleged in the complaint.

6. The question of law presented is presently being considered by the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas and this court should decline to

consider such question until decided by the State courts on the grounds of comity. *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746 (1971).

Wherefore, Defendant respectfully requests that Plaintiff's Motion to File Supplemental Complaint be denied.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(Caption Omitted in Printing)

DEFENDANT'S MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

To The Honorable Court:

Defendant respectfully moves that Plaintiff's cause of action be dismissed for the following reasons:

This honorable court does not have jurisdiction over the subject matter of this suit.

1. There is no substantial federal question under the holding of *Murphy v. California,* 225 U.S. 623, 32 S.Ct. 697, 56 L.Ed. 1229 and *Phillips v. City of Atlanta,* 57 F Supp. 588 aff. 145 F 2d 470.

2. There is no diversity jurisdiction because, as a matter of law, under the above authority, there is no amount in controversy. Plaintiff's statement in paragraph 7 of the jurisdiction allegation is at variance with the fact allegations and prayer for relief.

Wherefore, Premises Considered, Defendant City prays that this action be dismissed. Defendant further prays that Plaintiff take nothing by this suit against this Defendant, and for such other and further relief, either in equity or at law to which it may be justly entitled.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

(Caption Omitted in Printing)

[18] JULES MILLMAN,

called as a witness in behalf of the Plaintiff, having previously been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BICKEL:

Q. Would you state your name?

A. Jules Millman.

Q. The record shows you're a resident of the City of Chicago and president of Aladdin's Castle, Inc., is that correct?

A. That's correct.

Q. Now, then, isn't it correct that your amusement center in the Town East Mall, City of Mesquite commenced operation in February of 1977?

A. That's correct.

Q. What date did it commence?

A. The date?

Q. The date that it started business, yes.

A. February, '77.

[19] Q. Do you know what date in February?

A. The exact date was February 2nd.

Q. All right. Now, then, in your position as president of Aladdin's Castle have you determined what the income of your facility located there is?

MR. ARCHER: Your Honor, the Defendant on the grounds this calls for hearsay information and also information that is in violation of the best evidence rule. He certainly couldn't have personal knowledge of this matter. And if he is relying on any accounts or anything furnished by other parties we are entitled to see them.

THE COURT: If it's based on records they should be produced, not necessarily offered in evidence, but be available for examination.

MR. BICKEL: Well, Your Honor, the Federal Rules are that if he claims he knows in his capacity as an officer, I think he ought to be permitted to testify to it, Your Honor.

MR. ARCHER: May I take him on voir dire and establish it?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. ARCHER:

Q. Mr. Millman, do you have an accounting [20] department?

A. Yes, I do.

Q. Who is in charge of accounting?

A. Mr. Bernard Liss.

Q. And did they furnish you certain information as president from the accounting department?

A. Yes, they did.

Q. And was it written or verbal?

A. Verbal.

Q. You don't have any writing?

A. I don't have any writing with me.

Q. Who was the party that furnished you this information?

A. Mr. Robert Milchif.

Q. Is he present in Court?

A. No, he's not.

Q. Is he ill?

A. He's in the Chicago office.

Q. Is he ill?

A. No, he isn't.

Q. Do you have any independent knowledge, any personal knowledge of the operation of this place here in Mesquite?

A. Yes, I do. I go over all of the collection reports of my company every week.

[21] Q. Do what now?

A. I review all the collection records that the different stores in my company gross each week.

Q. Is that how you determine your information?

A. I have been paying particular attention to the Mesquite store.

Q. I mean, though, is it from going over your collection reports?

A. No, I told you I spoke to Mr. Bernard Liss.

Q. Uh-huh. Well, you said you had personal information.

A. Well, I have been paying close attention —

Q. Well, I'm talking about your personal knowledge, not what someone told you. Is it from reports?

A. It's partly from reports and partly from Mr. Bernard Liss. I have an accurate accounting of what my store is doing.

Q. What you're telling the Court is that part of your information is from written reports and part is from what someone told you?

A. The same information is just reiterated on what is on the reports.

Q. Do you have any of those reports with you?

A. No, sir, I do not.

MR. ARCHER: Your Honor, again we urge our [22] objection that the reports would be the best evidence of what they contain and the information given by another party would be hearsay.

THE COURT: I'll have to sustain the objection.

CONTINUED DIRECT EXAMINATION

BY MR. BICKEL:

Q. Based upon your knowledge — how many stores do you have?

A. Ninety-nine that are open today.

Q. All right. How long have you been in the business of operating these stores?

A. Since approximately 1969 when I started.

Q. Since when?

A. 1969.

Q. Based upon — did you make an investigation of the Town East Mall from the standpoint of its being an assessible or desirable market for one of your stores?

A. Absolutely, we go over every location.

Q. Did you do that yourself?

A. Yes, I did.

Q. Is Town East Mall a suburban shopping center?

A. Yes, it is.

Q. Can you describe it to the Court?

A. Town East Mall is typical of — it's a million [23] four plus shopping mall. It's typical of surburban American shopping malls all over the country. It has probably in excess of one hundred small stores such as mine and it's anchored by major tenants such as Sears and Roebuck and other, I believe two or three other major tenants of equal size.

Q. Do you have other stores located in other suburban shopping mall centers such as Town East Mall?

A. Of our ninety-nine stores, ninety-four of them are in similar situations.

Q. Based on your experience in the business in operating these stores since 1969, do you have an opinion as to the gross revenue? Oh, excuse me. Based upon your knowledge of the Town East market potential, potential market, based upon your investigation which you made in the City of Mesquite, do you have an opinion as to the gross revenue on a monthly or annual basis that can be generated by a store such as the one you're operating at Town East Center?

MR. ARCHER: We object to this question first, Your Honor, where he says such as this store because it's irrele-

vant and immaterial what another store might do such as this store might gross. We further object to the question because this witness hasn't been qualified as an expert witness [24] to answer that type of question.

THE COURT: Well, I'll have to overrule that objection.

MR. ARCHER: May I take the witness on voir dire and determine his expertise?

THE COURT: Use the podium, please, when you examine a witness, Mr. Archer.

MR. ARCHER: All right.

VOIR DIRE EXAMINATION

BY MR. ARCHER:

Q. Mr. Millman, these other stores that you talked about, did you obtain the information in the same manner as what you have already testified from the people in your accounting department and by looking at the reports?

A. Are you asking me about existing stores?

Q. Yes.

A. Existing stores?

Q. Yes.

A. Like I said, I go over the collection reports myself and I have a good feel for what all of our stores are doing.

Q. You have a good feel for it but you've never been personally present at any particular store every day so that you know what the collection truly is?

[25] A. I've been at certain particular stores every day on a weekly basis but I can't be at all one hundred stores in a week.

Q. All right. Could you tell us about the particular stores you've been to?

A. As to how much?

Q. I want to know what kind of store it was and where it was located and how it compared to the Mesquite store.

A. Okay. Let me take a store in suburban Milwaukee, Wisconsin called South Ridge Shopping Mall. It's owned by the Falcon Company and it's constructed with the same type of construction as Town East. It's approximately the same size. It's a two-level mall. My store is located in approximately the same location and it's approximately the same size. Our store at South Ridge Mall opened, I would say, in 1971 when our company was very small. I opened it myself with my brother. In the first two months I made all of the physical collections firsthand myself. That store was doing approximately two thousand dollars a week which is in the same general vicinity that the store in Mesquite is doing.

Q. What is the median income of the people in this area?

[26] A. I don't know, but I imagine it would be similar. I don't know but I imagine it would be similar because it's the same type of neighborhood and it's the same type homes you will see when you drive around the mall.

Q. Do you know what the median income is in the Mesquite area?

A. No, I do not.

Q. Did that enter into your survey?

A. It didn't enter into my survey because from my knowledge, now, that we have one hundred stores, what I look for is I look for the general population of the metropolitan area. In this case the general population of the Dallas area, Mesquite and the surrounding suburbs.

Q. Is this store you've testified to the only store that you have personal knowledge as to the actual revenue?

A. No, it is not.

Q. All right. How do you determine the actual revenue of other stores? Is it from reports or from being there personally and counting the money?

A. Now it is from reports at this stage since I can't be at a hundred stores personally.

Q. You don't have these reports with you?

[27] A. No, sir, I do not.

MR. ARCHER: We would again urge our objection, Your Honor.

THE COURT: I will let him express an opinion and let it go to the weight.

CONTINUED DIRECT EXAMINATION

BY MR. BICKEL:

Q. Mr. Millman, in your opinion, what is the gross revenue of your store at Town East?

A. In my opinion, the annual gross revenue will be in the vicinity of $100,000.00.

Q. All right. Do you know how much it cost to operate, that is what the expenses are on the Town East Center?

A. Yes, almost to the penny.

MR. ARCHER: Here again we object on the grounds that this calls for hearsay and the best evidence —

THE COURT: Mr. Bickel, I think these records ought to be produced if there is some question about it.

MR. BICKEL: Fine, Your Honor. I'll have to ask for a recess.

THE COURT: All right.

[31] Q. (By Mr. Bickel) Mr. Millman, with reference to your operation, you stated you had ninety-nine stores at this time?

A. That's correct.

Q. Have you ever received a complaint from any municipality or police department of the operation of your store being in violation of any peace law?

MR. ARCHER: Objection, Your Honor, unless he limits it to this witness's personal knowledge. Now, what somebody else may have complained about would be hearsay.

Q. To your personal knowledge.

MR. ARCHER: I don't mean about the complaint being made, I mean about it having occurred.

THE COURT: You have to confine it to your personal knowledge and not on the basis of what you have heard.

A. To my personal knowledge, no.

Q. Okay. To your personal knowledge, do persons under seventeen years of age loiter within or [32] without your store?

A. No, they don't, because we have very strict rules set by our manager, which, as I said before we do not allow any loitering, there's no food, there's no smoking, there's no eating on the premises.

Q. Where do your customers under the age of seventeen come from, do you know?

A. They're in the mall anyway probably waiting for their parents or they're in the mall to get out of the heat.

MR. ARCHER: I move that the answer be stricken as a conclusion, Your Honor, it's not responsive.

THE COURT: It is an opinion and as I said, I will permit him to express an opinion as to where they come from because it would be impossible for anybody to track or trail everybody that comes in there. Now, that goes to the weight of it.

Q. All right. Now, in these years, the 1970's, describe the character of the crowd at a shopping center such as Town East if you know.

MR. ARCHER: Your Honor, I object. That clearly calls for a conclusion as to character of the crowd.

Q. The makeup of the crowd.

[33] MR. ARCHER: No objection to that question.

A. The makeup of the crowd of the center itself?

Q. Yes.

A. They are composed of people from the suburban areas in which the shopping center is located. Every center that I have ever been in had, except during school hours, a large number of people under twenty-one, teenagers, high school people. It seems like in the '70s these new centers have gone up and it's a place for the kids and for people to go, some place to go, something to do. A lot of them have movie theaters and so forth. They seem to be in the mall whether there is an amusement center or not.

Q. All right. Do you have an opinion, don't tell me what it is, as to what effect on your business the implementation of an ordinance restricting or prohibiting persons under seventeen from playing the machines in your center at Town East Mall? What effect would that have on your business? Do you have an opinion?

A. Yes, I have an opinion.

Q. As to what effect that would have on your business?

A. Yes, I do.

Q. And tell the Court upon what is that opinion [34] is based.

MR. ARCHER: Your Honor, we object on the same grounds as before that it calls for hearsay testimony.

THE COURT: Well, the question now is on what his opinion is based. Let's find out what it's based on. It's not the opinion that he's giving.

A. My opinion is based on at one time or another having been in almost all of my one hundred stores and seeing that almost all of our customers, at least sixty percent of them or more, are persons seventeen years old or younger.

Q. I now ask you in your opinion what would be the financial effect upon your Town East store if persons under the age of seventeen were prohibited from playing the games located therein?

MR. ARCHER: Now, I make the objection on the basis of hearsay and the best evidence rule.

THE COURT: I'll overrule the objection.

A. In my opinion, my gross receipts would be cut by sixty percent and it would put my profit picture into the red.

MR. BICKEL: No further questions.

MR. ARCHER: No questions, Your Honor.

[35] THE COURT: All right. You may step down.

MR. BICKEL: Your Honor, subject to proof of the banker and the store operator with reference to the revenues, we rest.

THE COURT: All right.

MR. ARCHER: We call Officer Murray Jackson.

Your Honor, while we're waiting, may I recall Mr. Millman for just one question?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. ARCHER:

Q. Mr. Millman, does your company operate a store in the City of Dallas?

A. Yes, we do.

Q. Where is it located?

A. It's in Valley View Mall.

Q. Valley View Mall?

A. Yes.

Q. Is it a profitable operation?

A. Yes, it is.

MR. ARCHER: Pass the witness.

REDIRECT EXAMINATION

BY MR. BICKEL:

Q. What profit does it generate?

A. It's running slightly below the store in [36] Mesquite, I'd say half of what the Mesquite store is.

Q. And how much is the profit in terms of dollars, do you know the profit of the store at Valley View?

A. In my estimation, in my opinion, it's twenty thousand dollars on an annual basis.

Q. And do you know what the relationship between that profit is and between the profit at the Town East store is?

MR. ARCHER: Our same objection. The Court had sustained objection to the testimony about the profits.

THE COURT: I'll sustain the objection.

MR. BICKEL: That's all.

THE COURT: You may step down.

MURRAY JACKSON,

called as witness in behalf of the Defendant, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ARCHER:

Q. State your name and how you're employed.

A. Murray Jackson and I'm a police officer for the City of Dallas.

Q. And what are your particular duties with reference to youth?

[37] A. I work with youth on their truancy, safety, the PTA groups, crimes of youth against others, against the schools, the drug problem. Anything that is involved with youth, this is my purpose with the Department at this time.

Q. Now, you mentioned truancy, would you tell the Court what you do in your work regarding truancy?

A. Well, there is a state law that mandates that a child under the age of seventeen, between the ages of seven and seventeen will attend a hundred and sixty-five of a hundred

and eighty days that are allotted by the legislature for school, and anything over that can be filed on in JP Court for violation of the compulsory school law. An individual of that age, if they are not in school, they can be taken into custody for truancy.

Q. Is it a part of your duties to take such persons into custody?

A. Yes.

Q. Have you done so?

A. Yes.

Q. Now, what general area? Do you work in a particular area in the City of Dallas?

A. Yes, I work out around Kimball High School and I have the feeder schools from preschool, kindergarten [38] on into elementary and the middle schools that will eventually go to Kimball High School, a 25-square mile area.

Q. And have you worked in other areas in addition to this area?

A. East Dallas, West Dallas. I have done this for six years.

Q. All right. Would you tell the Court some of the problems that you encounter with reference to truancy, some of the locations that you find some of the problems that you have observed?

A. Well, we find them in each other's houses, in the parks, in the shopping centers, the 7-Eleven stores, the Sport-a-rama, which is the amusement center at Red Bird Mall; individual places, doughnut shops that have pinball machines in them. We find them in the creek bed, just in cars on the street, just about any place they can go.

Q. You've been in this work approximately six years?

A. Yes, sir.

Q. Based on your experience in working with the youths have you arrived at an opinion as to certain causes for truancy?

A. Yes.

[39] Q. Could you name some of those causes that in your opinion seem to be more probable?

A. Well, you start with the peer pressure that one person decides he doesn't want to go to school but it will be more fun if he can talk somebody else into joining him, so this puts then in their houses. Or, they will say let's go to the park because if we go home we'll get caught. The peer pressure is getting to the point where they are now in the entertainment centers with the pinball machines. If they have a place like this to go, and we can document this, we'll go up there and play the pinball machines. Why should we be in school when we can go play fussball. Why should we be in school when this is a lot more fun?

Q. How do you know when they're playing pinball machines that that's not just something that they're occupying their time with when they were already going to be truants?

A. I don't understand that.

Q. Well, let's say, you find one or a half a dozen kids playing pinball machines and it's during school hours, how do you know which is the cause and which is the effect? Do you have any documentation or any physical facts that support your opinion there?

A. Yes. We have arrested, say, for instance at [40] the 7-Eleven playing pinball machines since August of '76 twenty-four bodies and three of these we have arrested

one other time for truancy, not at a pinball machine, be it a park or whatever.

Q. So you're saying out of twenty-four arrests for truancy, twenty-one of those had never had any arrests for truancy or anything other than while they were playing pinball machines?

A. That I had taken them for.

Q. And that indicates what to you?

A. That they would probably be in school if it had not been for the availability of the machines.

Q. Now, have you also arrested persons playing pinball machines who were arrested also as truants or for when they were doing other things? You testified there were three of them that had arrests at a time when they were not playing pinball machines.

A. These were with other truants three other times.

Q. Now, do you have any documentation or remembrance as to what they were doing on these three other occasions for those other three parties?

A. Be it a park or in the car, I can't say, but it is documented on the FIR at the Youth Division.

Q. All right. Now, in addition to these arrests [41] that you described at the 7-Eleven store while they were physically playing pinball machines, were there other arrests at 7-Eleven stores?

A. Yes. These relatively same twenty-four people, we have fifteen people that we took into custody for truancy, I guess you would call it for sweating a dice game, they were either watching the game being played or they were waiting their turn or they had been playing but I could not testify that these other fifteen had been playing pin-

ball machines. By their admission they would say, yeah, we have been playing or we were waiting to play and that is why we are here but I can't take them into custody if they are fixing to or if they had that I didn't see them.

Q. All right. Now, you mentioned the Sport-a-rama, tell the Court where that is located.

A. That's in the Red Bird Mall off of Camp Wisdom and Love Freeway.

Q. What has been your experience with the truancy problems there?

A. It's heavy there, it's not in my district, it's in the Carter district and it's not a place that I could speak of. But I have had complaints that I would check. We would have complaints that we were enforcing the pinball violations at Kimball and they [42] were playing them out at Red Bird Mall. So I got with Officer Baker at Carter and he said yeah, go out there and check it. So, on February 24th, I did go in there for the first time and I did find a fifteen-year-old girl truant playing the pinball machine. And as a process of this I got with the man about it and explained to him about the laws of truancy and that they are not supposed to be in there playing fussball and definitely not the pinball if they are under seventeen.

Q. Did he have a sign displayed at the time?

A. Yes.

Q. What did the sign say?

A. It was overhanging by a chain near the bank of pinball machines saying that no one under seventeen years of age is allowed to play the pinball machines.

Q. Do you recall whether or not you questioned the girl as to whether she saw this sign or not?

A. She said she didn't see it, but there is no way she couldn't have seen it if she had gone through the door.

Q. There was no way she could have failed to have seen it?

A. There is no way she could have failed to see it. She had to walk right under it and they were posted in the room and it was hanging suspended under the [43] door.

Q. Now, do you know approximately what time of day this was?

A. It was 1:15 p.m.

Q. All right. Now, what are the hours that you allow under fifteen years old to play in the City of Dallas?

A. To play pinball?

Q. Yes, sir.

A. They can't play under seventeen years of age, period.

Q. That's twenty-four hours a day. Officer, what does your hours refer to? You have a certain provision in your ordinance relating to hours, what is that for, for entering the establishment?

A. Now, the Sport-a-rama — the amusement centers are governed by an ordinance if they are within five hundred feet of a school they cannot be operative between 9:00 a.m. and 3:00 p.m.

Q. But even after 3:00 p.m. the young people under seventeen are still not permitted to play certain types of machines, is that correct?

A. Yes. Well, nobody under seventeen period can play any marble board or pinball machine in the City of Dallas at any time.

[44] Q. But after, what was the hour, 3:00 o'clock?

A. After 3:00 o'clock a fifteen-year-old can go into the Sport-a-rama and play fussball but he cannot play the pinball machine.

Q. In your opinion, is the playing of pinball machines by persons under seventeen harmful to these persons?

A. Yes.

Q. Tell the Court why, in your opinion, you believe this is so.

A. Well, they are exposed to the older group that is there. We have made arrests of people playing the machines with the groups with marijuana on them. They are exposed to — for instance, I would not permit my child to smoke but he would play the pinball machine if I would allow it and he's twelve years for example. He goes down there and all these other folks are smoking and they will say, "Here, have a cigarette." He's being exposed to the language, the contraband maybe, the dirty jokes that might be told. Just the atmosphere itself I don't think is good.

Q. Are young people ever hustled by older people?

A. I couldn't testify to that.

Q. All right. Do you have an opinion as to whether or not there is any particular attraction to [45] these machines to people of young years?

A. Definitely.

Q. Tell the Court what you mean by that.

A. Okay. We've had instances where there was a pinball machine and then the games like the baseball game or the airplanes, where they shoot the airplanes down, this type of machine. Well, they say those are a ripoff

because they take your money and these pinball machines, you get a game for them.

Q. In other words, the challenge or the chance encourages them to play?

A. Yes, that would be a good way to put it.

Q. Have you ever known of instances where persons, young people under seventeen years of age spent money that they could not afford to spend for this type of activity?

A. Yes.

Q. Tell the Court what instances you're aware of.

A. For instance, two of them involve the same child. These people were involved in the free lunch program which means that they go to school and get meal tickets for free with which to buy or to exchange for lunches in the school lunchroom and if they can get these they will spend their money for the pinball machines.

Q. Do you know of any instances where people don't have the free lunches and they spend their money instead of buying food?

A. Well, the kids as well as the parents have told us that they were using their lunch money because there is no other way they can play the machines because there is no other way for them to get the money because they're not old enough to work to earn money, so they're using their lunch money to play the machines.

MR. ARCHER: Pass the witness.

CROSS EXAMINATION

BY MR. BICKEL:

Q. Officer Jackson, are you the gentleman that I have heard on either the radio or the TV on the way to work reporting about the traffic?

A. Yes, sir.

Q. Are you in a helicopter?

A. No.

Q. I was under the wrong impression then, I thought you were in a helicopter.

A. Well, the officers used to be in a helicopter but I have and I'm not going to get in a helicopter. We still do it with the station people who are in a helicopter and we just stay there in the studio now.

Q. Okay. Well, you probably have assumed that I [47] represent the people who are the parties to this lawsuit who operate this amusement center.

A. Yes, I understand that.

Q. I want you to know right now that they hold no belief in favor of truancy.

A. That's good.

Q. Did I understand your testimony to be that you had worked with truants as such, that was part of your official duties?

A. Yes.

Q. And you had been doing this for a number of years?

A. Right.

Q. All right. Now, one point I wanted to ask you about, are you telling the Court — you're not telling the Court, are you, sir, that if these kind of amusement centers didn't, if they didn't exist that these people would not be truant in the first place, are you?

A. No, you can't say that.

Q. Right. Now, talking about the money thing, this free lunch program and they were us. g their money for pinball machines. You're not telling the Court, are you, sir, that the children wouldn't spend their money on things other than food with or without the [48] pinball machine?

A. I can't testify to that.

Q. Right.

A. But I do know and I'm testifying that I did check the documents and they were on free lunches and it's not right.

Q. I don't think it is either.

A. And they were spending that money.

Q. Or anything for that matter.

A. If they can't afford the lunches, that's right.

Q. Right, I agree. Now, you mentioned the 7-Eleven stores a lot, is that a particular area?

A. It would be those in my area.

Q. Kimball High School?

A. The area where I check, yes.

Q. All right, sir. Is it correct that 7-Eleven, for whatever its motive, permits persons, children, people of any age to eat, drink and smoke in its premises, in and on its premises?

A. Yes.

Q. And isn't it a fact that people of all ages historically loiter about 7-Eleven stores?

A. It has been a problem.

Q. Right.

A. The ones — all I can testify to is during the [49] daylight hours because around the school they hang around the 7-Eleven.

Q. They do hang around the 7-Eleven store? And you have determined in your work with truants and in your observation of them at 7-Eleven stores and other places that one thing that tends to attract some of the school children are the libraries maintained by these establishments such as 7-Eleven?

A. No. And if I may answer it this way, we have started taking the machines from the 7-Eleven and we have no more lingerers. They get their food and they leave. They get their Coke and they walk on. Here again, I can document these, the ones they have taken out of either side of Kimball where they have taken the machines out and did not replace them, now, our loitering and trespassing problem is nil.

Q. The one thing you can't document is whether these people have ceased being truants, can you?

A. Well, okay, now, you're saying that the people we arrested before? See, there is nobody hanging around to arrest so there is no truants.

Q. No truants there?

A. Right.

Q. All right, sir. But you're not saying that there are not truants in the park or in the creek or on [50] a bus to Fort Worth?

A. No, I can't testify to that because I don't know where they are.

MR. BICKEL: Thank you.

MR. ARCHER: May this witness be excused?

THE COURT: Yes, you're excused as a witness.

MR. ARCHER: We call Sgt. Jimmy Smith.

THE COURT: Sgt. Smith has been on the stand before.

MR. ARCHER: Yes.

THE COURT: You're still under oath.

THE WITNESS: Yes, sir.

JIMMY W. SMITH,

called as a witness in behalf of the Defendant, being previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ARCHER:

Q. Sgt. Smith, you testified before, I believe, you were employed by the Mesquite Police Department and at least on previous occasions you have worked with juveniles, is that correct?

A. Yes, sir, it is.

Q. You testified to some extent about the problems regarding pinball machines, I don't remember [51] the extent of your testimony, would you tell the Court again what your dealing with these operations has consisted of in the past without going into a lot of it?

A. The primary problem that I experienced was the problem of truancy in that sort of establishment, one spe-

cifically near the police department in Mesquite that is no longer in operation now. I would estimate in the year 1974 that I probably took part in arresting some three hundred and fifty to possibly five hundred truants from that one establishment.

Q. Now, was the number of arrests the total number of truants involved or a partial number?

A. That was the ones that I had dealings with. Other officers I am sure made other arrests.

Q. Did you arrest every person that you saw that was out of school?

A. When I had the occasion to be there and they were in fact truant, I did arrest them.

Q. Well, what I am saying is that doesn't represent the total number of people that you might have known were truants?

A. No, sir, that was just from that one establishment.

Q. Oh, from one establishment?

[52] A. Yes, sir.

Q. Was this a pinball machine place?

A. Yes, sir, it was the Fun Safari and they had six or eight machines.

Q. Would you tell the Court again what your opinion is as to the effect that pinball machines and pinball machine establishments have no truants?

A. I think that this sort of establishment encourages truants to gather at these kind of locations.

Q. Are you saying they have already become truant?

A. No, sir, I don't think that they gather there after

they become truant, I think this is the type of establishment that encourages them to be truant and be there.

MR. ARCHER: I'll pass the witness.

CROSS EXAMINATION

BY MR. BICKEL:

Q. You told me about the Fun Safari before, I think it's located on a street, is it not, it fronts on a street or it did when it was in operation?

A. Yes, on South Galloway.

Q. I believe your testimony before was you told the Court that you had trouble with it in other respects, for example, drugs and stuff like that?

[53] A. On one occasion, yes.

Q. Do you find truancy in other places? Once the Fun Safari closed down, where did they go?

A. I don't know of any specific location that caused the congregation that we had at that establishment. There is truants at other places.

Q. Sure. Let me ask you this. Aside from truancy, let's take a Saturday when there is no school, do teenagers tend to congregate in shopping centers and in enclosed malls?

A. To some degree as parents shop.

Q. Right. And do they tend to congregate there whether there is a pinball machine place there or not?

A. I don't think I've noticed the congregation.

Q. I was just wondering.

A. I don't know.

Q. You're probably too young to remember but have you ever heard your father talk about the corner drug store?

A. No. I don't know if we had one.

Q. You don't recall teenagers gathering there in a social climate?

A. Yes, sir, I'm familiar with these type situations.

Q. All right. Does that still exist today, I [54] didn't know whether there were any more corner drug stores.

A. I think they congregate on parking lots and places instead of perhaps the corner drug store.

Q. Do they congregate in shopping centers?

A. Yes, sir, to some degree.

Q. In view of the fact that the shopping centers are air conditioned, the malls are?

A. Right.

MR. BICKEL: Thank you.

REDIRECT EXAMINATION

BY MR. ARCHER:

Q. Officer Smith, I'd also like to ask you with reference to the malls in Mesquite, being Big Town and Town East, what is the policy of the Mesquite Police Department as far as enforcement of the seventeen-year-old ordinance?

A. As a routine policy we don't patrol the interior of the malls. I think each mall has their own security guard and I don't think they act on this type law. We just simply respond to calls for service within the mall. When requested to do so we respond.

Q. But these calls for service involve law enforcement problems, do they not?

A. Yes, sir, such as a theft or shoplifting or [55] lost child, something of this nature.

Q. Would that be for both of the shopping center areas, the malls?

A. Yes, sir. As a routine we don't have any routine patrol in the interior of either mall by police officers.

Q. What would this do to your manpower situation if you had to begin patroling the malls for violations of under the seventeen-year-old ordinance?

A. We would probably have to hire about twelve more police officers before tomorrow.

Q. That's for the three different shifts?

A. Yes, sir.

MR. ARCHER: Pass the witness.

MR. BICKEL: Nothing further, Your Honor.

MR. ARCHER: May this witness be excused?

THE COURT: Yes. You're excused as a witness.

MR. ARCHER: We call Margaret Carruthers.

MARGARET CARRUTHERS,

called as a witness in behalf of the Defendant, being preiously sworn, testified as follows:

DIRECT EXAMINATIONS

BY MR. ARCHER:

Q. You testified in the preliminary injunction [56] hearing, did you not?

A. Yes, I did.

Q. And I don't recall exactly what your testimony was but I believe you testified that you worked with juveniles over a period of years?

A. Yes, sir, I did.

Q. And you expressed an opinion as to the problem of pinball machines and related amusement devices with reference to truancy?

A. Yes, sir. I testified of the past problems that we had with these areas.

Q. Did you also express an opinion as to whether or not the establishments and the machines were harmful in the sense that they encouraged truancy?

A. Yes, I did.

Q. Is that your opinion today?

A. Yes, sir, it is.

Q. What is the policy of the Mesquite Police Department as far as patroling the mall areas?

A. We don't normally patrol these areas unless we have a specific call because they have their own security people.

Q. You don't go in there for the purpose of determining whether persons under seventeen years old are playing the machines?

[57] A. No.

MR. ARCHER: Pass the witness.

CROSS EXAMINATION

BY MR. BICKEL:

Q. You were in here when one of the officers was testifying, were you not, Murray Jackson?

A. I don't know Murray Jackson.

Q. Then it had to be the other one. Where do the truants go when there aren't pinball places to go to?

A. I don't know. Just in the street.

Q. They are pretty tough to locate?

A. Or at a friend's house or a place like that.

Q. Why do they become truant? Why does a truant become a truant? I was a truant. Why do truants become truants?

A. Why do they become truant?

Q. Yes.

A. I could not answer that question, I'm not an expert.

Q. It's highly complex, isn't it, ma'am?

A. Yes.

MR. BICKEL: Thank you.

MR. ARCHER: May this witness be excused?

THE COURT: Yes, you're excused as a witness.

MR. ARCHER: We will call Officer Drew.

[58] WILLIAM C. DREW,

called as a witness in behalf of the Defendant, being previously sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ARCHER:

Q. You've testified previously that you were employed by the City of Mesquite Police Department and that you had worked in the areas of law enforcement involving pinball machine establishments, did you not?

A. Yes, sir.

Q. Do you recall whether or not you testified concerning specific problems at a specific location, Fun Safari?

A. I really don't recall really if I did or not.

Q. You don't recall if you testified to that before?

A. No.

Q. Tell the Court whether or not you did respond to calls at the Fun Safari regarding specific incidents?

A. Yes, sir, I did.

Q. Tell the Court what those incidents involved.

A. The last time I was assigned to the Patrol Division I normally worked the district adjoining the district that the Fun Safari was in and on numerous occasions I was dispatched as a backup unit to a [59] disturbance call which was usually juveniles fighting there in the Fun Safari or immediately outside in the parking lot. I recall one specific incident where I made a drug arrest inside the Fun Safari.

Q. Do you know what the age of the person was?

A. It was a juvenile, I don't recall the exact age.

Q. Now, the Fun Safari I believe sold food?

A. Yes, sir.

Q. With reference to the sale of food, have you observed any distinction in pinball places that sell food and don't serve food?

A. No, sir.

MR. ARCHER: Pass the witness.

MR. BICKEL: One second, Your Honor.

THE COURT: All right.

CROSS EXAMINATION

BY MR. BICKEL:

Q. Officer Drew, you and I are recently well acquainted after the last year, aren't we?

A. Yes, sir.

Q. Now, you were the initial gentleman who made the investigation of Aladdin's Castle and its parent company and recommended to the City Council of the City of Mesquite that a license not be issued in July or [60] August of 1976, did you not?

A. No, sir.

Q. Oh, I thought you were the gentleman who did make the investigation.

A. I did make an investigation.

Q. All right. And you reported the results of your investigation to the City Council of the City of Mesquite?

A. No, sir.

Q. Well, to the Police Chief who reported it to the City Council?

A. Yes.

Q. And based upon that recommendation of the Police Chief, which was based upon your recommendation, the license was denied, correct?

A. That is basically correct.

Q. All right. And thereafter we had a trial in the State District Court and you appeared as a witness in behalf of the City of Mesquite in that case, did you not, sir?

A. Yes, sir.

Q. All right, sir. Now, have you had occasion to observe the operation of Aladdin's Castle Amusement Center, whatever you want to call it, store, out at Town East Mall since it commenced its operation in [61] February of 1977?

A. Yes, sir.

Q. How many times have you observed it, please, sir?

A. I have no idea, I didn't keep track.

Q. Well, about, so the Court will have a rough idea of how many times you may have.

A. Well, are you talking about going in or walking by it or what?

Q. Either.

A. Probably about a dozen times.

Q. About a dozen times?

A. Yes.

Q. All right. Have you had any reports of a disturbance of peace there, His Honor would be interested in that if you had?

A. Not to my knowledge of a disturbance.

Q. All right. Have you had any reports of any drug traffic there?

A. Yes, sir.

Q. All right. And what reports were those?

A. I have heard from several informants and from a state agency that they have been receiving word that marijuana was being sold by some of the kids in Aladdin's Castle.

[62] In Aladdin's Castle there?

A. Yes, sir, in Mesquite.

Q. Have you followed up on any of that?

A. No, sir.

Q. Have you put undercover people in there?

A. No, sir.

Q. When did you receive these reports?

A. About two weeks ago.

Q. And you've done absolutely nothing about it?

A. Not yet.

Q. Have you had any other reports?

A. Of what?

Q. Of any misconduct being conducted at Aladdin's Castle facility there in Mesquite?

A. Yes, sir.

Q. And what were they?

A. Truancy.

Q. All right. Have you made any arrests for truancy in there?

A. I haven't.

Q. Has anyone?

A. I don't know if you technically call it arrest but I believe on one occasion one of the assistant principals from North Mesquite High School went over there to look around and found one or two [63] students in there.

Q. And this is the truancy you're referring to?

A. Yes, sir.

Q. Have you had any other reports of any misdeeds there?

A. Not to my knowledge.

Q. And this business with reference to drugs is completely unsubstantiated at this time?

A. What do you mean by that?

Q. You don't know whether it's true or not?

A. At this time.

Q. Right. You've done absolutely nothing to find out about its truth or falsity, have you?

A. Not yet.

MR. BICKEL: No further questions.

MR. ARCHER: At this time the Defendant rests.

THE COURT: All right.

MR. BICKEL: May it please the Court, I can bring the witness in cold, I don't know where I'll get with the witness but I haven't talked to him but I will be glad to go ahead and put him on.

THE COURT: All right.

DENNIS PRESSWOOD,

called as a witness in behalf of the Plaintiff, being duly sworn, testified as follows:

[64] **DIRECT EXAMINATION**

BY MR. BICKEL:

Q. State your name, please, sir.

A. Dennis Presswood.

Q. How old are you?

A. Twenty-three.

Q. Where do you live?

A. I live in Mesquite, Texas.

Q. How long have you lived there?

A. Since February.

Q. Who do you work for?

A. Aladdin's Castle.

Q. How long have you worked for Aladdin's Castle, Incorporated?

A. Approximately one year.

Q. Since February have you been primarily at the Aladdin's Castle store in Town East Shopping Center in Mesquite, Texas?

A. Yes, sir, I've been there since February.

Q. What is your connection there?

A. I'm the manager of the store.

Q. All right. Can you tell me do you know of your personal knowledge how much money is, the revenue of Aladdin's Castle, Inc. is at Town East Mall? First of all, do you know?

[65] A. Yes.

Q. How do you know? How do you know that?

A. I'm responsible for making the collections out of the machines each week.

Q. You physically go around and take the money out of the machines?

A. Yes, sir.

Q. How often?

A. Once a week.

Q. After you take it out, do you count it?

A. Yes, sir.

Q. And after you take it out and count it, what do you do with it?

A. I bag it and take it to the bank for deposit.

Q. What bank?

A. The First State Bank of Mesquite.

Q. Can you tell the Court how much money per week you have been taking out of the machines, counting and depositing in the First State Bank?

MR. ARCHER: Your Honor, I believe there are machines there other than pinball machines and we would like to limit it to the pinball machines.

MR. BICKEL: Well, I don't want to limit it to pinball machines, Your Honor, I am talking about all machines.

[66] MR. ARCHER: We would object to any testimony about any machines other than pinball machines as being outside the scope of the matter under inquiry.

THE COURT: I will overrule the objection.

A. You want just pinball machines?

Q. All the machines.

A. All the machines?

Q. Yes.

A. We have had one bad week of fourteen hundred and a good week of two thousand and between that is what we average a week.

Q. Since when?

A. Since February.

Q. Now, how much is your salary per month?

A. My salary is eight hundred per month.

Q. And how much is the salary — are there any other employees?

A. Yes, sir, we have two part-time employees, and they are paid each three dollars an hour.

Q. And what is the total amount of the payroll, not counting the eight hundred dollars a month paid to you, at that center per month or per week?

A. The payroll for these two would be six hundred dollars.

Q. Total?

[67] A. Total.

Q. And has that been since the center opened in February, 1977?

A. Yes, sir, it's been the same since we opened.

Q. All right. Now, the rent is paid out of Chicago, isn't it?

A. Yes, sir, it is.

MR. BICKEL: Your Honor, I was checking to see if I have the lease into evidence, I don't believe I do, it doesn't make any difference. I have no further questions.

MR. ARCHER: No questions, Your Honor.

THE COURT: All right.

MR. BICKEL: One second, Your Honor.

Q. (By Mr. Bickel) Sir, do you have any policy or practice with respect to school children under the age of seventeen at any time?

A. Well, when it's in session we do not let them into the store and school lets out in Mesquite at 2:00 o'clock.

Q. Okay. Have you heard of any instances of any sale or transfer of prohibited drugs, including marijuana, at your store?

A. No, sir, not at my store.

MR. BICKEL: No further questions.

[68] MR. ARCHER: No questions.

MR. BICKEL: You may step down.

I'll ask counsel if you can stipulate that the lease entered into by and between Aladdin's Castle with Homart is for a ten-year period of time and for a total amount of $292,050.00 paid on a monthly basis and that the rate of the lease is twenty-four hundred per month paid by Aladdin to Homart.

MR. ARCHER: We would stipulate that it's either twenty-four hundred dollars a month or whatever it is a month, whatever that calculates out to, and I assume that's correct. If it's incorrect, then I will stipulate to whatever is correct.

THE COURT: What is the figure?

MR. BICKEL: Two hundred ninety-two thousand for a ten-year lease.

THE COURT: Two hundred ninety-two thousand fifty dollars for a ten-year lease?

MR. BICKEL: Yes.

MR. ARCHER: Twenty-four hundred per month would be the approximate amount.

MR. BICKEL: We rest and close.

MR. ARCHER: The Defendant rests and closes.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action
No. CA 3-77-0194-C

ALADDIN'S CASTLE, INC.
vs.
THE CITY OF MESQUITE

ORDER

Came on to be heard on June 10, 1977, Aladdin's Castle, Inc. Petition for Injunction and Supplemental Complaint for Declaratory Judgment and the parties having appeared by and through their attorneys of record, the following proceedings were had:

Defendant City of Mesquite presented its Motion to Dismiss Plaintiff's Complaint for Lack of Jurisdiction and for Failure to State a Claim upon which relief may be granted. The Court, being of the opinion that an amount in excess of $10,000.00 was alleged and that Plaintiff's Complaint alleged a constitutional deprivation as well as diversity of citizenship, Defendant's motion was overruled.

Whereupon, Plaintiff prayed leave to file its Supplemental Complaint seeking declaratory relief to which Defendant duly objected as being untimely, said Supplemental Complaint having been filed on June 6, 1977. The court thereupon offered to allow Defendant a continuance to prepare for trial upon the petition for declaratory relief but stated that both matters would be heard at the same time. Defendant's counsel declained a continuance upon the basis that a prompt hearing upon the injunctive relief was important to Defendant. Permission was granted to Plain-

tiff to file its Supplemental Complaint seeking declaratory relief.

Whereupon, Defendant moved for dismissal of Plaintiff's petition for declaratory relief for lack of jurisdiction because said complaint for declaratory relief failed to allege a case or controversy and failed to establish standing of Plaintiff to seek such relief. Defendant's motion was overruled.

The court then proceeded to hear the evidence of the parties and argument of counsel and based upon such evidence finds as follows:

That portion of City of Mesquite Ordinance 1353 passed by the City Council on February 7, 1977, wherein the term "connection with criminal elements" is stated and the definition thereof contained in Section 9 of said ordinance is void for vagueness and contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

The court further finds that a rational basis exists for the age classification contained in the City of Mesquite Ordinances prohibiting the playing of pinball machines by those under seventeen (17) years of age and Plaintiff's prayer for injunction is accordingly denied and the temporary injunction heretofore entered is hereby dissolved.

Costs of this action are taxed against the parties in the amount and to the extent that each party incurred same.

Signed and entered this 29th day of July, 1977.

W. M. TAYLOR

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action
No. CA 3-77-0194-C

ALADDIN'S CASTLE, INC.
vs.
THE CITY OF MESQUITE

JUDGMENT

This action came on for hearing before the Court, Honorable W. M. Taylor, Jr., District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED, ADJUDGED AND DECREED that that portion of City of Mesquite Ordinance 1353 passed by the City Council on February 7, 1977, wherein the term "connection with criminal elements" is stated and the definition thereof contained in Section 9 of said ordinance is void for vagueness and contrary to the due process clause of the Fourteenth Amendment to the United States Constitution.

It is further ORDERED, ADJUDGED AND DECREED that a rational basis exists for the age classification contained in the City of Mesquite Ordinances prohibiting the playing of pinball machines by those under seventeen (17) years of age and Plaintiff's prayer for injunction is accordingly denied and the temporary injunction entered is hereby dissolved.

ORDERED entered the 29th day of August, 1977, this 20th day of September, 1977.

W. M. TAYLOR
United States District Judge

Office-Supreme Court, U.S.
FILED
APR 16 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1577

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF MESQUITE

Appeliant,

v.

ALADDIN'S CASTLE, INC.,

Appellee.

On Appeal From The United States Court Of Appeals
For The Fifth Circuit

APPELLEE'S MOTION TO AFFIRM

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QUESTION PRESENTED

Appellant ("Mesquite"), Defendant in the trial court, here continues a five-year effort, accepted in part by the District Court, but rejected by the Fifth Circuit, to prohibit Appellee ("Aladdin's") from operating an amusement center in the City of Mesquite, Texas. The question presented to this Court is under what circumstances, if any, may a municipality pass and enforce an ordinance, under the guise of regulation, that denies its citizens, businesses and taxpayers their constitutional rights of due process of law, equal protection of the laws, and freedom of association.

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No. 80-1577

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF MESQUITE

Appellant,

v.

ALADDIN'S CASTLE, INC.,

Appellee.

On Appeal From The United States Court Of Appeals For The Fifth Circuit

APPELLEE'S MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, moves that the final judgment and decree of the United States Court of Appeals for the Fifth Circuit be affirmed on the ground that the question presented to this Court is so unsubstantial as not to warrant further argument.

STATEMENT

This is an appeal from the final judgment and decree entered on November 17, 1980, by the United States Court of Appeals for the Fifth Circuit, holding Mesquite's ordinance No. 1353 to be violative of the due process and equal protection clauses of the constitutions of the United States and the State of Texas and to be violative of the constitutional guarantee of freedom of association. Aladdin's and Mesquite have been embroiled in five

years of litigation in state court and federal court, involving various attempts by Mesquite to prohibit Aladdin's from owning and operating a family amusement center in the City of Mesquite, Texas. This case involves Mesquite's latest attempt, which is two-fold. First, Mesquite seeks to prohibit children under the age of 17 from playing any machine in such an amusement center, after having previously allowed children of age 7 and above to play such machines. Second, Mesquite seeks to deny a license to operate an amusement center to any applicant determined by its chief of police to have "connections with criminal elements," as that phrase is defined by the ordinance.

The Fifth Circuit held that the 17-year-old age was repugnant to the due process and equal protection clauses of the constitutions of the United States and the State of Texas in that the ordinance was arbitrary and irrational. Mesquite's stated reasons for passage of the 17-year-old age were truancy and exposure of minors to corrupting influences. The Fifth Circuit found that these grounds were baseless and that the ordinance had no legitimate purpose. The Court's opinion is comprehensive and speaks for itself; and it would not serve any purpose at this point to recite the evidence and authorities contained therein.

The Fifth Circuit also held that the term "connection with criminal elements," as defined by ordinance No. 1353, was unconstitutionally vague because it failed to give individuals fair notice of the conduct proscribed by it and because such ordinance engendered the possibility of arbitrary and discriminatory enforcement by public officials.

After finding the 17-year-old age had no rational basis nor legitimate purpose, the Fifth Circuit went on to hold that the age restriction, even if it did have a rational basis and a legitimate purpose, was unconstitutional inasmuch as it deprived

individuals under 17 years of age their liberty interests in association.

Mesquite here challenges the Fifth Circuit's opinion only insofar as it holds ordinance No. 1353 to be void for vagueness and to be violative of minors' liberty interests in association. However, Mesquite does not question the ruling that the ordinance is arbitrary and irrational.

ARGUMENT

The decision of the United States Court of Appeals for the Fifth Circuit is plainly correct and Mesquite's jurisdictional statement concedes this by failing to challenge the Fifth Circuit's holding that ordinance No. 1353 is arbitrary and irrational under the constitutions of the United States and the State of Texas. Moreover, the Fifth Circuit held that Mesquite loses its case under the rational basis theory relating to due process and equal protection* and under the strict scrutiny theory relating to freedom of association. Thus, Mesquite has nothing to gain by its appeal in connection with the 17 year age restriction, thereby making its appeal one of scholarly or intellectual interest, and inappropriate for consideration by this Court. *Cf., Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (writ of certiorari dismissed as improvidently granted).

Mesquite's argument for plenary review by this Court of the Fifth Circuit's decision in connection with minors' liberty interests in association is that the opinion presents a novel constitutional question that must be resolved so that legislative bodies can determine which of their statutes trammel fundamental rights. This argument must fail for three reasons.

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*Since Mesquite does not challenge the Fifth Circuit's holding that the ordinance is arbitrary and irrational, Aladdin's does not believe it is necessary to discuss the merits of this argument. It suffices to say that the Fifth Circuit's opinion is based upon settled law, as applied to the facts of this case.

First, assuming that the Fifth Circuit's decision with respect to freedom of association presents a novel constitutional question, it has been this Court's practice to avoid the unnecessary decision of such a question. *Leroy v. Great Western United Corp.*, ... , U.S. ..... , 99 S. Ct. 2710, 2715-2716 (1979). Certainly the decision of the Fifth Circuit with respect to the irrationality of ordinance No. 1353 constitutes more than an adequate basis for affirmance of the Fifth Circuit's decision.

Second, by its appeal, Mesquite asks this Court to define the totality of the relationship of the juvenile and the state, so that Mesquite can make a wholesale determination as to the constitutionality of its laws dealing with minors. This Court has been, at best, reluctant to undertake this task. *Carey v. Population Services International*, 431 U.S. 678, 692 (1977).

Third, the Fifth Circuit's opinion with respect to the liberty interests in association of minors presents no novel constitutional question, and it is correct and should be affirmed. There can be no dispute with the Fifth Circuit's conclusion that the right of association is fundamental, 630 F. 2d 1029, 1041; and this Court has recognized the right of social association in *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974). Also, this Court has passed upon the state's power to regulate conduct that is otherwise constitutionally protected, if the regulation applies only to children, *Bellotti v. Baird*, 443 U.S. 622 (1979); and the Fifth Circuit was quite correct in stating that Mesquite's ordinance was not based upon any of Justice Powell's three considerations that might permit the state to restrain minors in a way which would be unconstitutional if applied to adults, 630 F. 2d 1029, 1043-1044. In short, the state has no more interest in barring minors from an amusement center than it does in barring them from the parks, the playgrounds or the churches or in choosing the friends with whom a minor will associate. At the most, these are matters that should be left between the minor and his or her parents. And, of course, Mesquite has available to it other laws to protect its young people from undesirable influences. 630 F. 2d 1029, 1042.

Mesquite also makes other statements in its jurisdictional statement that the Appellee will briefly address. First, Mesquite claims that the Fifth Circuit's decision raises the question of whether Aladdin's has standing to assert the associational interests of children. It does. *Carey v. Population Services International*, 431 U.S. 678, 683-84 (1977).

Mesquite also mentions that no party contended that the strict scrutiny standard is applicable in this case. However, this is a question of law, upon which the Fifth Circuit had broad latitude and upon which it could make an independent determination as to the legal conclusions and inferences to be drawn from the facts in the case. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526 (1961). The District Court held that the proper test of law was the rational basis test. The Court of Appeals' latitude includes the legal standard to be applied to the facts. See *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 193 (1963); also *Miller v. United States*, 587 F. 2d 991, 994 (9th Cir. 1978).

Finally, Mesquite seeks review of the Fifth Circuit's void for vagueness holding in connection with the phrase "connection with criminal elements" and the definition thereof. Mesquite erroneously characterizes that phrase and definition thereof as an "in-house directive." Mesquite's argument is based upon a misreading of ordinance No. 1353, is supported by no authority and is patently lacking in logical substance. The ordinance is regulatory and proscriptive; and an applicant must seek the consent of five parties, including the chief of police to obtain or renew a license. Thus, ordinance No. 1353 fails to give an applicant for a license fair notice of the conduct proscribed, engenders the possibility of arbitrary and discriminatory enforcement of the ordinance and permits the City of Mesquite to become a government of men and not laws. It is submitted that this portion of the case is controlled by *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

CONCLUSION

For all of the foregoing reasons, Aladdin's respectfully submits that Mesquite presents no substantial question for the decision of this Court and that the judgment and decree of the United States Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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Counsel for Appellee

PROOF OF SERVICE

I, Thomas L. Case, counsel for appellee, and a member of the Bar of the Supreme Court of the United States, hereby certify that I hand delivered three (3) copies of the foregoing Motion to Affirm on the 15th day of April, 1981 to James A. Ellis, Jr., Esq. of Carrington, Coleman, Sloman & Blumenthal, 2500 South Tower, Plaza of the Americas, Dallas, Texas 75201.

/s/ THOMAS L. CASE

Thomas L. Case

Office-Supreme Court, U.S.
FILED
APR 27 1981
ALEXANDER L. STEVAS,

No. 80-1577

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

CITY OF MESQUITE

Appellant.

v.

ALADDIN'S CASTLE, INC.

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

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In The

Supreme Court of The United States

October Term, 1980

No. 80-1577

City of Mesquite

Appellant.

v.

Aladdin's Castle, Inc.

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM

REPLY ARGUMENT

a. Scope of Questions Presented

The first primary issue presented involves the constitutional limitations, if any, upon the power of a municipality to regulate by ordinance the operation by children of coin-operated commercial amusement machines. The Court of Appeals herein apparently found that the Fourteenth Amendment, by its due process and equal protection clauses, precluded a legislative regulation requiring the

owner of such an amusement parlor to restrict actual operation of such machines to persons at least seventeen years of age or younger children whose parents or guardians are present. Admittedly, the lower Court invoked various techniques or standards of analysis (purporting to apply both the "rational relation" test and the "strict scrutiny" standard) and determined, apparently, that the right of children under seventeen to play commercial coin-operated amusement machines without a parent or guardian present is a fundamental constitutional right.

The first question presented in the Jurisdictional Statement contests in all respects the holding of the Court of Appeals that the Constitution prohibits the challenged legislative conditions and qualifications upon children's operation of commercial coin-operated amusement devices. Relying upon this Court's Rule 15.1(a), Appellant has assumed that the subsidiary questions, concerning the selection of a proper standard for judicial review of the challenged legislation and the application of that standard, are fairly included and will be considered by the Court.

Appellant does not, in any way, concede or agree that its ordinance is arbitrary or irrational or otherwise in violation of the Fourteenth Amendment. All the issues of the constitutionality of the legislative qualifications on any rights of children to play coin-operated amusement machines are clearly raised by the Jurisdictional Statement.

b. Reasons For Plenary Review

To oppose this Court's full consideration of the case, on briefs and arguments, the Appellee next suggests that the appeal seeks a definition of "the totality of the relationship of the juvenile and the state." That is a patently erroneous statement of the purpose of the appeal. The purpose simply is to obtain a decision as to the constitutional limitation (if

any) upon a municipality's power to regulate the playing of commercial coin-operated amusement devices by children unaccompanied by their parents or guardians. The totality of the legal relationships between children and the state is not at issue.

Finally, in opposing plenary review, the Appellee argues that the opinion below is correct and presents no novel constitutional question. However, the lower Court opinion itself recognizes that this Court has never considered whether any constitutional right of association "in a social context" exists or whether it extends to prevent legislative regulation of children's operation of coin-operated commercial amusement devices. 630 F.2d at 1041.

Further, in reaching its decision the Court of Appeals in effect overruled this Court's long-standing opinion on the power of a state to regulate such commercial amusement parlors, *Murphy v. California*, 225 U.S. 723 (1912). In *Murphy*, this Court upheld the state's power to regulate or even prohibit such non-useful commercial enterprises and said,

> That the keeping of a billiard hall has a harmful tendency is a fact requiring no proof, and incapable of being controverted by the testimony of the plaintiff that his business was lawfully conducted, free from gaming or anything which could affect the morality of the community or of his patrons. The fact that there had been no disorder or open violation of the law does not prevent the municipal authorities from taking legislative notice of the idleness and other evils which result from the maintenance of a resort where it is a business of one to stimulate others to play beyond what is proper for legitimate recreation.

225 U.S. at 629. How much more do those evils affect children? How "irrational" was it for the City of Mesquite to

protect its health and welfare through legislating as it did to protect children against those perceived evils?

The Court of Appeals herein held that this Court's opinion in *Murphy* is no longer good law, even when children are involved. It apparently held further that a legislative body can make no *moral* judgment as to standards of decency or as to the effect of a particular enterprise or activity on the welfare of the community or even on its children. 630 F.2d at 1040, 1041, n.16.

If the lower court is correct in its holding that the ordinance's prohibition of play by unaccompanied children is unconstitutional for any reason — either that it is "irrational" or that it violates a fundamental constitutional right of children to associate wherever and with whomever they please — then it would follow that other legislative regulation or prohibition of businesses, based upon any legislative considerations of decency or morality or the special vulnerability of children to morally corrupting influences, are unconstitutional.

Appellee's Motion to Affirm does not diminish or even debate the substantiality of the issues presented. The technical arguments therein raised should not deter this Court from fully considering the issues presented, through briefs and oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 25th day of April, 1981, three copies of the Brief in Opposition to Appellee's Motion to Affirm of the City of Mesquite for an appeal from the United States Court of Appeals for the Fifth Circuit have been served by depositing the same in the United States mail, postage prepaid and addressed as follows:

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All parties required to be served have been served.

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No. 80-1577

IN THE

Supreme Court of The United States

OCTOBER TERM, 1980

CITY OF MESQUITE

Appellant.

v.

ALADDIN'S CASTLE, INC.

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Do children under the age of seventeen have an unconditional and unqualified constitutional right to play coin-operated amusement machines located in a commercial establishment?

2. Is the term "connection with criminal elements" unconstitutionally vague when such language is merely an "in house" directive to the Chief of Police to investigate an applicant's (applicant for a license to operate pinball machines) character and the Chief of Police has no power to issue or deny a license?

3. Are these issues justiciable at the instance of the owner of a commercial amusement enterprise who itself has received a license to operate coin-operated amusement machines?

LIST OF PARTIES

The parties are the same as in the caption.

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Appellant,

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Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANT'S BRIEF ON THE MERITS

REFERENCE TO PRIOR DECISIONS

The opinion of the District Court of the United States for the Northern District of Texas, William M. Taylor, Judge Presiding in Cause No. CA-3-77-0194-C entitled "Aladdin's Castle, Inc. V. City of Mesquite is found at 434 F. Supp. 473 (N.D. Tex. 1977).

The opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 77-2990 likewise entitled, is reported at 630 F. 2d 1029 (1980).

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction of this issue as shown by the following:

1. The statutory provision believed to confer jurisdiction of this appeal in the Supreme Court of the United States is 28 U.S.C. Section 1254(2).

2. The judgment of the United States Court of Appeals for the Fifth Circuit as to which review is sought is dated and entered of record on November 17, 1980.

3. The Suggestion for Rehearing En Banc filed by Appellant (City) on November 28, 1980, was denied by Order entered December 15, 1981.

4. Appellant's Jurisdictional Statement was filed March 13, 1981.

5. The Supreme Court of the United States noted probable jurisdiction on May 18, 1981.

STATUTORY PROVISIONS CONSTRUED

The case involves construction of the Fourteenth Amendment to the United States Constitution and Ordinance No. 1353, Code of the City of Mesquite. Both provisions are reproduced in Appendix to Jurisdictional Statement and are not again reproduced.

ISSUES ARGUED

Issue: Whether there was a rational basis for the regulation prohibiting a business establishment from allowing minors under seventeen years of age to operate a coin-operated amusement machine unless accompanied by a parent or guardian.

Issue: Whether the City of Mesquite met the test of strict scrutiny in proving a state interest regulating

the age of persons allowed to play coin-operated amusement machines.

Issue: The proper standard of Judicial Review to be accorded a State (City) regulation of the business of a coin-operated amusement center.

Issue: Whether Aladdin's Castle, Inc. had standing to complain of a provision in a City Ordinance instructing the Chief of Police as to how to make an investigation of an applicant's character.

Issue: Whether the term, "connection with criminal elements" in an ordinance of the City of Mesquite is unconstitutionally vague in the context in which it is used to instruct the Chief of Police as to how he should make his investigation and report.

STATEMENT OF THE CASE

A. Procedural Background

This suit was brought by Aladdin's Castle, Inc. in the United States District Court for the Northern District of Texas for injunctive relief seeking to prohibit enforcement of a provision of City Ordinance 1353 limiting the operation of coin-operated amusement machines to persons seventeen and older and those under seventeen accompanied by a parent or guardian.

On the day of trial, Aladdin's filed a supplemental complaint seeking declaratory relief to the effect that a portion of Section 2 of said Ordinance requiring the Police Chief to make an investigation of an applicant's "character and conduct as a law abiding person" and requiring that he consider the applicant's "connections with criminal elements" as one of the matters relating to the character of the applicant be held unconstitutional for vagueness. (J.A. 111)

City questioned Aladdin's standing to raise the question of vagueness (J.A. 115) but was overruled by the trial court.

Upon trial the United States District Court upheld the age limit provision but held the "connections with criminal elements" provision void for vagueness. Both parties perfected appeal to the United States Court of Appeals for the Fifth Circuit which court reversed the trial court on the age limitation and affirmed that portion of the trial court judgment declaring the quoted language void for vagueness, holding that Aladdin's has standing in its own right and standing to invoke the rights of third parties, presumably its potential customers.[1]

B. Factual Background

In 1973 the City of Mesquite enacted Ordinance 1103 prohibiting persons under the age of seventeen from operating coin-operated amusement machines such as pinball machines unless accompanied by a parent or guardian. (J.A. 77) At that time Aladdin's Castle, Inc. was unknown to City (J.A. 67) and Bally Manufacturing Company had not purchased Aladdin's.

In 1975 representatives of Aladdin's requested that the City of Mesquite relax such ordinance in so far as Aladdin's, but not other operators, were concerned, representing to City that they, Aladdin's would provide high quality supervision of children in their establishment. (J.A. 29)

At Aladdin's urging, and in reliance upon Aladdin's representations that its customers would consist primarily of children whose parents were present in the mall area, although not physically within Aladdin's establishment

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[1]It is not clear from the opinion how the alleged vagueness of the statute affects the potential minor customers.

(J.A. 126), City granted Aladdin's request to allow such minors to play Aladdin's machines.

On February 7, 1977, the City Council being of the opinion that Aladdin's representations were false and/or misleading, City revoked the earlier relaxation of Ordinance 1310 and enacted Ordinance 1353 which reinstated the 1973 age limitation. Throughout the entire period from enactment of the Ordinance in 1973 to enactment of Ordinance 1353 in February of 1977, the age limitation was in effect AT ALL TIMES FOR ALL OPERATING ESTABLISHMENTS except that on February 5th and 6th, 1977, Aladdin's operated under Ordinance No. 1310 AFTER City had posted notice to enact ordinance 1353. (J.A. 44) All other establishments in the City have operated pursuant to the age limitation from 1973 to date as have establishments in other cities including the City of Dallas (J.A. 135) and the City of Garland (J.A. 25). No evidence was offered in the trial court that any establishment in any of these cities were operating unprofitably, including Aladdin's store at Valley Mills, (J.A. 129)[2].

City's police authorities had determined a need for the age limitation due to problems of drugs, truancy and other problems (J.A. 130-152) although not necessarily at Aladdin's. (At time of trial, Aladdin's had only operated in Mesquite for four months. Sgt. Drew had information but not confirmation, of drug trade in Aladdin's) (J.A. 152).

In the trial court, Aladdin's had stipulated that the proper review was upon the "Rational Basis Test" and that Aladdin's had the burden of proof. (Pl. Brief in Support of Verified Complaint-R 43 at 67). The City

[2]The statement of the court below that City knew the change would clearly make the Mesquite operation unprofitable and force it to close is not supported by the record.

offered a minimum of evidence consisting of the testimony of three police officers of the City and one City of Dallas police officer, (J.A. 130-152) and testimony as to the City of Dallas age limitation (J.A. 135). A copy of the City of Garland Ordinance is in the record (J.A. 25). City did not attempt to show the hundreds of police incidents in other cities or bring in the multitude of witnesses that it could have had the case been tried under the strict scrutiny test.

The question of "association" was raised for the first time in the United States Court of Appeals for the Fifth Circuit; that Court being of the opinion that such association gave rise to a constitutionally protected right. The evidence of association is not in the record and it is not clear from the opinion how the Court below determined that any "association" other than mere concurrent presence existed. While it can be assumed that some of the players may converse during or between plays, there is no evidence that such conversation would be any different from that occurring in any other commercial transaction such as visiting a physician or dentist or purchasing a handgun at a pawn shop.

The record is devoid of any evidence of "association" in the constitutional sense.

SUMMARY OF THE ARGUMENT

The first three issues relate to the regulation of minors playing coin-operated amusement machines in a commercial establishment and the proper scope of judicial review to be accorded such regulation and are subsidiary questions to the first question presented in the jurisdictional statement.

The fourth issue relates to the third question presented in the jurisdictional statement and the fifth issue relates to the second question presented in the jurisdictional statement.

Argument under the first three issues demonstrates that the City met such burden of proof as is required for the type of regulation involved; that under the "rational basis" test City is entitled to a presumption of validity of its enactment and the burden of proof was on Aladdin's Castle, Inc. to prove a lack of harm, evidence of which is totally lacking. *Vance v. Bradley,* U.S. , 99 S.Ct. 939 (1979); *Schilb v. Kuebel,* 404 U.S. 357 at 364, (1971); *Ginsberg v. New York,* 390 U.S. 629, (1968); *Williamson v. Lee Optical Co.,* 348 U.S. 483, (1955); *McGowan v. Maryland,* 366 U.S. 420, 393, (1961); *Tigner v. Texas,* 310 U.S. 141, (1940); *Goldblatt v. Hempstead,* 369 U.S. 590, 569, (1962).

City demonstrates that this Court has traditionally indulged a deference for the determinations of legislative bodies and that it has not required legislation to cure all ills at one time. *Railway Express Agency v. New York,* 336 U.S. 106, (1949); *A. F. of L. v. American Sash Co.,* 335 U.S. 538, (1948).

Further, testimony of harm based upon unarticulated community values is not contrary to the rule in *Ginsberg v. New York,* Supra and *Village of Belle Terre v. Boraas,* 416 U.S. 1 at 9, (1974), quote:

> "The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where *family values, youth values* and the blessings of quiet seclusion and clean air make an area a sanctuary for people." (emphasis added)

Finally, City would show that *Murphy v. California,* 225 U.S. 623, (1912), relied upon by the trial court is, contrary to the opinion of the Court below, good law today with respect to determinations by a state that an activity in its actual setting and *not in the abstract* is harmful and that *Murphy,* Supra was cited with approval as recently as 1973 in *Paris Adult Theater I v. Slaton,* 413 U.S. 49, (1973) N. 15.

City submits that if the test of "strict scrutiny" is applied its burden is far greater than under the "rational basis" test. Nevertheless, the Court below failed to take into consideration the distinction between the rights traditionally accorded children and adults and misconstrued the holding in *Bellotti v. Baird,* 443 U.S. 622, (1979), as authority that the standard for minors and adults is the same under all circumstances.

Even in fundamental rights cases, the impact upon the individual is given some consideration.

The impact upon a minor of being denied the right to play a pinball machine or view "girlie magazines", *Ginsberg,* Supra, are but trivial compared to the right to decide whether or not to bear a child with the lasting effect of such decision extending far past majority, or even the right to an education, *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, with all the association inherent in the public schools. Therefore, as in *Ginsberg,* Supra, where First Amendment rights were involved, the same standard is not in all cases applied to adults and children and the proof offered by City is equal to that of the State of New York in *Ginsberg,* Supra.

City submits, however, that the Court applied the incorrect standard of review because the right of association is not involved in this case other than such as might be purely incidental to any business transaction; that the broad scope

given the term "association" would encompass virtually every business transaction known from a visit to the dentist to a call by a plumber to repair a leaking faucet.

Nor are the factors present to make it "suspect" legislation. A basic distinction exists between a group comprised of children of a politically dominant group and groups composed of minority race, color or religion; to wit: the natural love and affection borne by parents for children will afford protection for that group not available to traditional "suspect" groups. *Wisconsin v. Yoder,* 406 U.S. 205 (1972)

While it is clear that the Court below thought little of the wisdom of the challenged regulation, where the suspect criteria is absent the courts do not sit in judgment as to the wisdom of legislation. *James v. Strange,* 407 U.S. 128 at 134, (1972)

> "We do not inquire whether this statute is wise or desirable or whether it is based on assumptions scientifically sustantiated, *Roth v. United States,* 354 U.S. 476, 501, 77 S.Ct. 1304, 1317, 1 L.Ed. 1498 (1957) (Separate opinion of Harlan, J.) misguided laws may nonetheless be constitutional."

Nor is it practical for the Courts to judge the wisdom of the multitude of State and local enactments.

Both the legal precedents of this Court and practicality militates against extending the more stringent review of strict scrutiny to cases of this nature.

The decision of the Court below as to Aladdin's standing to raise the question of vagueness is predicated upon an incorrect construction of the ordinance; reasoning that the instruction to the Chief of Police to consider an applicant's "connection with criminal elements" established a standard

by which the applicant would have to conduct itself. Such is not the case at all.

Regardless of how the instruction is communicated to the Chief, the applicant will be granted or denied a license upon the basis of "good character as a law abiding citizen".

The instruction to the Police Chief requires an intelligence gathering task exactly as reviewed by the Court in *Laird v. Tatum*, 408 U.S. 1, (1972).

As required in *Ex Parte Levitt*, 302 U.S. 633, 34, (1937), Aladdin's failed to show it "has sustained or is immediately in danger of sustaining a direct injury . . . ."

Any evidence offered as a result of the investigation would not be in the terms of the direction to the Chief of Police but would be in its actual context.

Nor is the challenged language unconstitutionally vague in the context in which it is used.

The Court below applied criminal case standards to business regulation. *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, (1952), and failed to give effect to the legislative policy designed to prevent the control of amusement machines by organized crime.

Thus, the Court below erred in finding standing of Aladdin's Castle, Inc. to raise the question of vagueness and in holding the challenged language unconstitutionally vague in the context in which it was used.

ARGUMENT AND AUTHORITIES

The paramount question presented by this appeal is the proper standard of judicial review to be accorded the provision of the challenged ordinance regulating the playing of coin-operated amusement machines by minors. The Court

below held that minors possess an unconditional and unqualified constitutional right to play coin-operated amusement machines located in a commercial establishment and applied the strict scrutiny test.

The case was tried and decided by the trial court upon the traditional "rational basis" test.

No question of "strict scrutiny" or "compelling state interest" was raised in the trial court and the evidence was not offered to meet the more exacting "compelling state interest" test.

Even the trial court, however, confused the burden of proof requirement, characterizing the evidence offered by City as "slender reeds" indicating his understanding that the burden was on the City to go forward with the evidence contrary to A.C.I.'s acknowledgment of such burden. Obviously, the Plaintiff and movant having accepted the burden of proof and stipulated that the case was controlled by the "rational basis" test[3], City offered only a minimum amount of evidence.

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[3]See Plaintiff's Brief in Support of Verified Complaint for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction, (R 43 at 67)

> "The 'compelling state interest' test which places the burden of strict scrutiny upon the state to justify legislative classification based upon suspect criteria (race, national origin, lineage and alienage) or fundamental interests (e.g., right to travel, residency requirements, right to vote and right to procreate) *is not involved in this litigation.* What *is* involved is the 'rational relationship' test which requires A.C.I. to prove that the classification created by Mesquite is without any reasonable basis and hence, purely arbitrary." (Emphasis Added)

RATIONAL BASIS

If the "rational basis" test was the proper form of review it was not encumbent upon City to offer any testimony and City could have relied upon the legal presumption traditionally accorded legislative acts. *Vance v. Bradley,* U.S. , 99 S.Ct. 939 (1979); *Schilb v. Kuebel,* 404 U.S. 357 at 364, (1971); *Ginsberg v. New York,* 390 U.S. 629, (1968); *Williamson v. Lee Optical Co.,* 348 U.S. 483, (1955); *McGowan v. Maryland,* 366 U.S. 420, (1961); *Tigner v. Texas,* 310 U.S. 141, (1940).

In *Schilb v. Kuebel,* Supra, this court stated, 404 U.S. at 370,

> "The record is silent but the flow indeed may be the *other way.*" (Emphasis Added).

In *McGowan v. Maryland,* Supra, the court said, 366 U.S. at 426,

> "The record is barren of any indication that this apparently reasonable basis does not exist . . . "

and, 366 U.S. at 425,

> "State Legislatures are presumed to have acted within their constitutional powers . . . "

The court answered this question in *Ginsberg v. New York,* 390 U.S. 629 at 642,

> "While these studies all agree that a causal link has not been demonstrated, they are equally agreed that a causal link has not been disproved either."

Therefore, under the decision of this court, if the record be "barren" or "silent" or "no causal link has been demonstrated", nevertheless, the State is "presumed to have acted

within its constitutional power". See *Goldblatt v. Hempstead,* 369 U.S. 590, 596, (1962),

> "Our past cases leave no doubt that appellants had the burden on 'reasonableness'. e.g., *Bibb v. Navajo Freight Lines,* 359 U.S. 520, 529, (1959) (exercise of police power is presumed to be constitutionally valid); *Salsburg v. Maryland,* 346 U.S. 545, 553, (1954) (the presumption of reasonableness is with the State); *United States v. Carolene Products Co.,* 304 U.S. 144, 154, (1938) (exercise of police power will be upheld if any state of facts either know or which could be reasonably assumed affords support for it)."

See also *Vance v. Bradley,* Supra, 99 S.Ct. 950,

> "In an equal protection case of this type, however, *those challenging* the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."

Notwithstanding the foregoing traditional rule of law and a stipulation by A.C.I. that it had the burden of proof, the City, nevertheless, offered testimony from four highly qualified witnesses (J.A. 130-152) to the effect that these amusement centers created numerous incidents of truancy, illegal drugs and other problems. City submits that the proffered testimony is more than adequate to support a "rational basis" and is not "slender reeds", but in fact is ample to support the "compelling state interest" requirement if it should be determined that scope of review is properly applied. City submits, however, that if it is determined that the "compelling state interest" test should be applied, considering that the case was not tried on such

basis, the proper course would be to remand for a fuller development of the evidence under that scope of review.

If, however, the proper standard is the rational basis as it has been since this court decided *Tigner v. Texas*, Supra, in 1940, overruling *Connolly v. Union Sewer Pipe Company*, 184 U.S. 540, then the presumption given legislative enactments should be adequate absent evidence.

Obviously, the harm believed to result from the prohibited activity is not something that can be proven in the same manner as a broken bone in a personal injury case. The proof, of a necessity, must depend upon certain interpretations involving the experience of those in police work; of community values interpreted by the elected representatives and more than anything, a working knowledge of children.

This court has traditionally indulged a deference for the determinations of legislative bodies. In *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. at 563; this court stated,

> "We can only assume that the Louisiana legislature weighed the obvious possibility of evil against whatever useful function a closely knit pilotage system may serve. Thus the advantages of early experience . . . might have prompted the legislature to permit Louisiana pilot officers to select those with whom they would serve."

Certainly, the Louisiana legislature could not prove to a certainty that relatives of river pilots would be more qualified than non-relatives any more than the State of Maryland could prove that the selling of certain articles on Sunday would be harmful.

This court quotes Chief Justice Waite from *Munn v. State of Illinois*, 94 U.S. 113, in *Williamson v. Lee Optical*, Supra,

> "For protection against abuses by legislatures, the people must resort to the polls, not the courts."

The Court further states in *Williamson v. Lee Optical*, Supra, 34 U.S. at 488,

> "The day is gone when this court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions because they may be unwise, improvident, or out of harmony with a particular school of thought."

It is clear that the court below departed from the principles applied by this court and placed the burden of proof on City. See under heading "Rational Basis" 630 F. 2nd at 1039,

> "The record is entirely devoid of evidence that a person under seventeen years of age has been exposed to a person who would promote gambling, the sale of narcotics and other unlawful activities. . . ."

And

> "Initially, therefore, we note that the City failed to demonstrate the need which would give rise to an interest in protecting its young citizens from corrupt influences in amusement centers."

and, same page,

> "If such people do go to the centers, there is *no evidence* that they are drawn by the machines . . . the City did not *show* that barring children from these centers would in any way stop these people from associating with children." (emphasis added)

Even though the court below purported to consider the questions separately under the "rational basis" test, throughout the opinion the court applied the "strict scrutiny" test and denied the City any presumption of validity as well as misreading the evidence.

Under the rules of law laid down by this court, it is not necessary that all ills be cured at the same time, *Williamson v. Lee Optical,* Supra; *Railway Express Agency v. New York,* 336 U.S. 106, (1949); *Semler v. Oregon State Board of Dental Examiners,* 294 U.S. 608, (1934) and the legislative body may exempt or defer one phase while regulating others. *A. F. of L. v. American Sash Co.,* 335 U.S. 538, (1948). The court below required, however, that the regulation cure all ills and cover all phases of the problem or fall.

It is therefore clear that if the test is the "rational basis" as held by the trial court, the regulation is within the Constitutional limits set forth by this court because, as stated in *Ginsberg v. New York,* 390 U.S. at 642,

> "While these studies all agree that a casual link has not been demonstrated, they are equally agreed that a casual link has not been disproved either."

If then, City failed to prove a causal link between the operation of pinball machines and truancy and other ills recited by witnesses, certainly the evidence offered by A.C.I. has not disproved such idea.

The concept that playing pinball games by minors is harmful is exactly on par with the concept that looking at "girlie magazines" by minors is harmful determined by the New York legislature and upheld by this court in *Ginsberg,* Supra.

Had this court placed the burden of proof on the State of New York in *Ginsberg,* Supra, as did the court below

in the instant case the State of New York would have been in the same position as is the City of Mesquite because the ills associated with either are not so open and obvious as other ills but must depend, to some extent upon unarticulated community values. Both Mesquite and New York, while not willing to go to the extent of Sparta, does desire to develop ideal citizens. If a minor must forego playing a few games or looking at girlie magazines in order that he develop into a good citizen, this is hardly a deprivation on par with the treatment accorded the youth of ancient Sparta.

Conceded, neither the prohibition of girlie magazine nor pinball games will, standing alone, develop good citizens. But as this court has held, *Williamson v. Lee Optical*, Supra; *Railway Express Company v. New York*, Supra; *Semler v. Oregon Board of Dental Examiners*, Supra; the legislative body is not required to cure all ills at one time. The City and State has other legislation, (compulsory school attendance, alcohol consumption age limits and a host of other laws), dealing with minors and it should not be expected that one ordinance is to cure all ills associated with minors. Nor will all of the laws on the books of all the states cure all problems associated with minors. But they may be one step in the right direction, *Railway Express Agency v. New York*, Supra. At the very worst, such laws can cause little harm to the minors (as opposed to A.C.I.) for throughout recorded history children were not able to play pinball machines except during the last century because they were unavailable. No severe trauma appears to have been inflicted by such lack prior to the invention of such games.

The rationale that protection in one area is unconstitutional because the regulation fails to afford protection in another area is self-defeating and likened to an argument that the prohibition of handguns on the person is uncon-

stitutional because a malefactor might harm a citizen with a knife or club.

But what of the application of community values as a basis for statutes? At least half of our regulations are influenced, to some degree, by imprecise community values. Commercial prositution and social extra-marital sex both carry the potential for the same physical harm. It is only in the community value area that commercial sex is deemed more harmful than social union.

This court, in upholding the application of community values as a basis for legislation in *Village of Belle Terre v. Boraas*, 416 U.S. 1 at 9, (1974), said,

> "The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where *family values, youth values* and the blessings of quiet seclusion and clean air make an area a sanctuary for people." (emphasis added)

Although additional traffic was mentioned, it is doubtful if it could be proven that six persons unrelated by blood or marriage would create more traffic than the same number of people having some blood or marital relationship.

Pure and simple, the case involved six male and female students living in one house unrelated by blood or marriage and such action did not comport with the community values of the *Village of Belle Terre*. As stated by Justice Marshall, 416 U.S. at 17, (dissenting opinion),

> "The village has, in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents."

What were the "youth values", the protection of which the individuals with different lifestyles had to be "fenced out"? City submits that those values were not such that

they were capable of precise proof. No one contended that having the multiple unit of unmarried individuals would make the youth of the community physically ill or unsafe.

The ills that would adversely affect youth values were those understood but unarticulated in *Ginsberg v. New York*, Supra, and in the instant case more appropriately called "moral values", no different than the values sought to be protected by laws prohibiting gambling, prostitution, pornography, statutory rape and selling on Sunday.

Legislation prohibiting some of the above prohibited acts is justified on the basis of other factors such as Sunday sales in *McGowan v. Maryland*, Supra, but the desire to protect moral values is present and everyone knows it. Contrary to what the court below may believe, legislators do not legislate in a "morally neutral" vacuum and never will and this court has never required such. The concept of right, decency and honor is too deeply rooted in our traditions to ignore.

City agrees with the court below that recreation or idleness, per se, is not harmful. The City provides parks and other means of recreation and encourages its citizens to partake of the benefits thereof. The playing of a pinball machine or a game of billiards when viewed in the abstract, is not harmful. Unfortunately, these games are not played in the abstract.

Idleness, like food, is neither all good nor all bad. The idea of having food is good because without it one would starve. This does not mean, however, that no food is harmful. More people in this country suffer from eating than from starvation.

Idleness is likewise good in the abstract. Without some idle time to refresh our minds and bodies, we would wear out. But as with food, not all idleness is helpful. Children

that are taught to act in a responsible manner by being assigned duties at home, required to attend school at the designated times and use their money for useful purposes, all other things being equal, grow into more responsible citizens than those that are encouraged to forego responsibility for idleness.

At the time *Murphy v. California,* 225 U.S. 623, (1912), was decided the benefits of idleness, in the abstract, was not unknown.

The members of the *Murphy* court knew that rest and relaxation was needful equally as well as those deciding *Papachristou v. City of Jacksonville,* 405 U.S. 156, (1972). They likewise knew that the participation in certain games such as baseball, football and other sports provided needed exercise, furthered a feeling of teamwork and sportsmanship and improved the quality of life. Men and women of the *Murphy* era as well as of the present, attended the theater, visited art galleries and performed many acts that produced no income and provided no food or shelter.

Any suggestion that the *Murphy* court considered all non-productive activity harmful is misleading and incorrect.

Nor did *Papachristou,* Supra, hold that all idleness was good.

At the same term in which *Papachristou,* Supra, was decided this court decided *Wisconsin v. Yoder,* stating, 406 U.S. 205 at 228,

> ". . . but as alternative to the equally *undesirable consequence* of unhealthful child labor displacing adult workers, or on the other hand, forced *idleness* . . . ." (Emphasis Added)

The exact words relied upon by the court below are as follows; 630 F.2d at 1041, n. 16,

> "All loitering, loafing, or idling . . . is not *necessarily* detrimental to the public welfare . . . it may be and often is entirely innocuous." (Emphasis added)

Nothing in the foregoing is contrary to the decision in *Murphy v. California,* Supra, nor the position of City herein. The *Murphy* Court was speaking on the law of nuisance which traditionally has allowed works of necessity or productive work more leeway than non-productive or frivolous activity, e.g. a citizen making noise repairing his home after a storm versus making the same amount of noise for purposes of amusement or the noise from a truck delivering needed food versus a group of motorcyclists riding for pleasure. See *King v. Columbian Carbon Co.,* 152 F. 2d 636, 641 (5th Cir. 1946)

> "As a concession to industrial progress and social utility the law will not abate a *useful* and lawful enterprise even though it be a nuisance. . . ." (emphasis added)

With or without that comment with regard to idleness, *Murphy v. California,* Supra, is the only expression by this court addressed to the question at hand and involved a review of the prohibition of a particular type of activity by the State in the actual setting and context of pool halls as they existed; not in the abstract, and a finding that prohibition of that particular activity or idleness was within the power of the State. The court judicially knows that at least as much "association" occurs in a pool hall as in a pinball establishment.

Rather than *Murphy v. California* being weakened by more recent decisions of this court, City submits that the holding is strengthened by the more recent cases of *Ginsberg v. New York,* Supra, *McGowan v. Maryland,* Supra

and *Village of Belle Terre v. Boraas,* Supra. City submits that to the extent *Murphy v. California* holds that a state may examine a particular activity and determine that in the actual setting and context in which it exists such activity may be proscribed or regulated, that such holding has never been overruled or weakened and that it is the law today. See *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, (1973), n. 15.

The City fathers, with the advice of their police department that must deal with errant youth and are charged with protection of all youth, has viewed the situation in its actual setting. They are better able to judge than the judiciary the effect the activity in its real life setting will have upon youth values; upon their efforts to protect youth from the numerous factors within and without the individual that detract from the youth values and community values believed important in the proper development of our citizenry. The fact that they are unable to articulate these values in a precise manner in no wise detracts from their existence. Most people could not give a precise definition of "liberty" but believe it important.

The deference given by this court to determination of elected representatives of the people is not outdated doctrine or a chance phrase picked up from an old case and carried forward after the reason for it has ceased to exist. It is founded upon sound policy and is the cornerstone of our doctrine of separation of powers.

See *Shaprio v. Thompson,* 394 U.S. at 655, (1969), denying any role of a "Super-legislature" and *Village of Belle Terre v. Boraas,* Supra, as to a "zoning Board of Appeals".

Thus, the courts should exercise restraint in extending their supervisory role over lawmaking into those areas not heretofore considered "suspect legislation", i.e., race,

sex, national origin or truly fundamental areas such as speech, religion and other rights vital to our way of life.

If this deference to the determination of facts and circumstances regarding community values by the elected representatives of the City of Mesquite as was given to the Village of Belle Berre and to the New York Legislature in *Ginsberg V. New York,* Supra, is indulged and the burden of proof is placed on the party challenging the legislation; the presumption, standing alone or the evidence standing alone and certainly both taken together, will support a rational basis for the challenged regulation.

STRICT SCRUTINY TEST

If the proper scope of judicial review to be applied is the "strict scrutiny test" then City concedes that it has a much heavier burden, although not necessarily an insurmountable one, because of the different status of children in our society. It is not so much that different legal standards apply to children but that children are in *fact* different from adults. The regulation in *Ginsberg,* Supra, involved a "fundamental right", e.g. speech, not within the ambit of obscenity as defined by this court, and was no more narrowly drawn than the instant ordinance. (The statute in *Ginsberg* absolutely prohibited sale to minors whereas the instant ordinances permits playing when accompanied by a parent.)

The court below cites *Bellotti v. Baird,* 443 U.S. 622, (1979), as authority that the standard is not reduced because minors are involved. City submits that the court below has misconstrued this court's pronouncement as to regulation of minors.

While clearly children are not *denied protection under the constitution* due to their minority, there are simply some rights possessed by adults that have not been ex-

tended to children. *Bellotti v. Baird,* 443 U.S. at , 99 S.Ct. at 3045 states,

> "The guiding role of parents in the upbringing of their children justifies limitations on the freedom of minors. The State commonly protects its youth from adverse governmental action and from their own immaturity by requiring parental consent to or involvement in important decisions by minors."

To hold that regulation of the activities of all children at all ages is on par with the regulation of the activities of adults is to ignore plain facts of life. Each and every day children are denied rights routinely enjoyed by adults. See *Parham v. J.R.,* — U.S. —, 99 S.Ct. 2473 (1979) at 99 S.Ct. 2515,

> "Under our law, parents make decisions for their minor children that deprive the children of liberty and even life itself."

No one would give serious consideration to a law allowing one adult to require another adult to "eat your spinach", "wash your hands", "go to church", or any of the one thousand and one commands given to children as part of their daily upbringing. The fact that in the instant case parents act through their elected officials to control the activities of their children imposes no greater *restraint* upon the right of a minor to do as he pleases than if the parent acted directly. In *Bellotti v. Baird,* Supra, the court was considering restraint by parents through the state.

Recognizing that this court has held, *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, that the importance of an activity to the individual does not determine whether or not the right is "fundamental", it is clear that the importance of the right to the individual was at least one factor in *Bellotti v. Baird,*

> ". . . . there are few situations in which denying a minor the right to make an important decision will have *consequences so grave and indelible*" (emphasis added)

and, same page

> *"For these reasons* . . . the State may not impose a blanket provision . . . ; (emphasis added)

If the "important decision" in *Bellotti* were not made prior to majority the woman would be stuck with responsibility that would not end with her majority but would last far into adulthood.

In the case of marriage, voting or playing pinball, one need only defer the activity to the age of majority, much as one who happens not to like spinach.

Nor does the regulation discriminate against any person because we all served our apprenticeship under the authority of adults and everyone has an equal chance to reach the age of majority without the lasting burden sought to be imposed in *Bellotti v. Baird,* Supra. In this important distinction, the court below erred and the evidence supports the regulation whether the right to play pinball is "fundamental" or otherwise because of the distinction between regulation of the activities of minors and that of adults and the relatively minor impact upon the individual.

SCOPE OF REVIEW

The court below incorrectly applied the constitutionally protected "right of association" in this case. Right of association is not involved to any extent.

There is no evidence or suggestion in the record that minors visit the establishments for reasons other than

to play the machines. Any *harmful* association suggested by the testimony consists of *unwanted* association by those adult persons who would victimize the young. It is not suggested that young people play the games as members of a team or engage in tournaments as in the case of outdoor sports (baseball, football, etc.) or bowling. Primarily, the games are played solo. Although individual players may ocassionally converse with each other between or during plays, the overriding purpose for visiting the establishment is the rental of a machine for a cash consideration variously estimated at between five and nine dollars per hour. The playing requires a high degree of concentration and at least in A.C.I.'s case, the customers are not allowed to do much socializing between games and cannot even drink a coke or "loiter". (J.A. 126) More social contact exists in numerous other commercial activities such as the gas lines of recent, standing in line at a bank-teller cage or a visit from the plumber to repair a faucet.

Constitutionally protected "association" means something more than mere concurrent physical presence purely incidental to a commercial transaction for, except for hermits, almost every activity known involves some interchange between human beings. The fallacy in raising an activity to constitutionally protected "fundamental" status every time two or more people are present or engage in casual interchange is that the government would be relatively powerless to govern.

When two or more people engage in a dice game, in a drag race or an act of prostitution; when a vendor sells merchandise, when a con artist bilks a victim; all of these activities would attain protected status if the term "association" is given its broadest scope.

City submits that the term "association" in the constitutional sense, means, at the minimum, some desire or intent to mingle or engage in interchange with others.

If two or more people rent a motel room, an automobile or a boat the rental transaction itself should be governed by the same law that governs the transaction when the rental is by one person.

Once minors have rented the machine lawfully (accompanied by a parent or guardian) and once it is shown that they desire to associate while engaging in lawful activity; *at that point* the "association" becomes a fundamental right. Likewise, when adults enter into a dice game their "association" e.g., conversation and social activity, is protected but not *their participation in the dice game* where such is illegal.

No one would seriously contend that the rental of a hotel room for purposes of prostitution is constitutionally protected because prostitution requires participation of more than one person.

Under the broad interpretation given the term "association" by the court below the photographing of children in sex scenes one at a time could be prohibited upon the showing of a rational basis but if photographed in groups of two or more a more stringent test must be applied. Such a rule is itself irrational.

Had such a rule been applied in *Ginsberg*, Supra, the court could have reasoned that minors purchasing the magazines would share them with their friends and read "association" into the activity. The State having failed to prove a causal link between the magazines and harm and the right to share these books with their friends being fundamental, this court would have been compelled to void the New York statute.

It cannot be doubted that the six college students in *Village of Belle Terre v. Boraas*, Supra, "associated" in the broad sense of the term and likely more than the players of

amusement machines. Nevertheless, this court considered and rejected any "right of association" in upholding that City's ordinance.

This court judicially knows that there is much more associational activity in the public schools than playing pinball machines and yet found that the right to attend public school is not a fundamental right. *San Antonio Independent School District v. Rodriguez,* Supra.

To hold that viewing non-obscene magazines, (as applied to adults) residing in a home or attending public school, with the associational activity inherent therein, is not fundamental but that playing amusement machines is fundamental is, to say the least, startling.

Nor is the classification based upon "suspect" criteria. *Kahn v. Shevin,* 416 U.S. 351, (1974); *Shapiro v. Thompson,* 394 U.S. 618, (J. Harlan, dissent. op.). (See also n.1, Appellant's Brief citing Appellee's Brief).

There is one great and distinct difference in the group classified in the instant case and those consisting of groups of a particular race, color, national origin or other suspect groups.

The natural love borne by members of the politically dominant group for their children, members of the politically impotent group, will provide more protection for that group than all the courts and all the rules of law in the land. The feeling of responsibility and protection for one's children is one of the more basic attributes of man and makes unnecessary any suspicion that the dominant group will sacrifice the interests of the politically impotent group as in the case of those of different race, color or national origin. *See Parham v. J.R.,* 99 S.Ct. 2504,

> "more important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."

Every person of voting age comprising the dominant group was at one time a member of the politically impotent group and can be expected to understand the needs of such group. See *Wisconsin v. Yoder,* Supra.

This leaves then, only the question of the wisdom or value of the ordinance.

This court states in *Dandridge v. Williams,* 397 U.S. 471 at 487,

> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this court**** but the Constitution does not empower this court to second-guess state officials**** "

City recognizes that there is divided opinion as to whether such regulation should be exercised. Many cities do not so regulate this activity and likewise many do have the same or similar regulations.

See also, *James V. Strange,* 407 U.S. 128 at 134, (1972),

> "We do not inquire whether this statute is wise or desirable or whether it is based on assumptions scientifically substantiated, *Roth v. United States,* 354 U.S.

> 476, 501, 77 S.Ct. 1304, 1317, 1 L.Ed. 1498 (1957) (Separate opinion of Harlan, J.) misguided laws may nonetheless be constitutional."

and, same p.

> "Our task, however, is not to weigh this statute's effectiveness but its constitutionality."

This court expressed the concept in *Dandridge v. Williams,* Supra, 397 U.S. at 485, (1970), as follows:

> "And it is a standard that is true to the principal that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy."

See also, *San Antonio Independent School District v. Rodriguez,* Supra, 411 U.S. at 33,

> "It is not the province of this court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."

Thus, whether the courts deem the instant ordinance wise or unwise, so long as reasonable minds may differ upon the question, and obviously they do, it is a basic tenet of federalism that the courts do no substitute their opinion for that of the legislative body except in those extreme cases where animosity and prejudice due to race or similar factors call into question the objectivity of the lawmakers or those cases involving truly fundamental rights such as speech, religion, voting and the right to travel. This rule is firmly established by this court and should control the instant case. See *Vance v. Bradley,* 99 S.Ct. 939 at 946, quoting *Fireman v. Chicago, R.I. & P. R. Co.* 393 U.S. 129, 138, 89 S.Ct. 323, 28, 21 L.Ed. 2d 289 (1968),

> ". . . and this kind of policy, under our constitutional system, ordinarily is to be fixed only by the people acting through their elected representatives".

But aside from the legal and precedential basis for such holding, City submits that it is mandated by a practical basis.

As stated by Justice Harlan in his dissenting opinion in *Shapiro v. Thompson,* 394 U.S. at 655,

> "Virtually every state statute affects important rights."

Those that do not affect "important" rights affect lesser rights. If the courts take on the responsibility of determining, de novo, the wisdom of the multitude of State and local statutes and ordinances the courts will need to become experts in every field of human life and endeavor. The time required to accomplish this task would be without limit. This, in turn, would detract from the courts' primary role of deciding questions of law. Nor, does City believe, that the judiciary is in a position to acquire the expertise necessary for such a monumental task.

This court stated in *San Antonio Independent School District v. Rodriguez,* Supra, 411 U.S. at 42,

> "In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this court's lack of knowledge and experience counsels against premature interference with the informed judgments made at the local levels."

No doubt, if review as to wisdom of legislation is extended to all of the action of State and local bodies such as in the

instant case there will be many other areas wherein the courts will express similar misgivings.

Therefore, the precedents of this court and practicality militates against extending the more stringent review of strict scrutiny to cases of this nature.

STANDING

The court below erred in its interpretation of the provision of the challenged ordinance relating to "connections with criminal elements," (J.A. 84) deeming such provision to be proscriptive. Such is not the case at all.

The ordinance (J.A. 82-3) reads, in part,

> "Any person desiring to obtain a license for a coin-operated establishment shall apply to the City Secretary by original and five (5) copies; one of which shall be routed to the City Manager, Chief of Police, Chief Building Inspector and City Planner for review.
>
> The Chief of Police shall make his *recommendation* based upon his investigation of the applicant's character and conduct as a law abiding person and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude *and connections with criminal elements*, taking into consideration the attraction by such establishment of those of tender years." (emphasis added)

The definitions considered by the court below are reproduced at (J.A. 86-7) but are not a basis of the court below's decision.

The decision of the court below as to standing was predicated upon the mistaken belief that a finding of some "connection with criminal elements" would automatically

bar an applicant from obtaining a license. There is no such provision in the ordinance.

The import of the quoted provision is a *directive to the Chief of Police* as to *what matters he is to investigate.* There is no prohibition in the ordinance as to the granting of a license to a person having "connections with criminal elements".

Upon approval by all parties the City Secretary is required to issue the license. If, on the other hand, one or more parties fail to approve the application, the matter is referred to the City Manager for decision, (J.A. 84),

> ". . . he shall review such application, together with such recommendation as may be furnished and shall *approve* such application or *disapprove* same. . . ."

and, (J.A. 85),

> "Upon appeal to the City Council of the City Manager's decision based upon an adverse recommendation by the Chief of Police as to applicant's character, the applicant shall have the same burden as prescribed in Article 305 V.A.C.S. to show to the council that he or it is *of good character as a law abiding citizen* to such extent that a license should be issued. Upon hearing, the council may reverse the decision of the City Manager in whole or in part or may affirm such decision."

Nowhere will it be found in the ordinance that "connection with criminal elements" is a bar to a license or that the Chief of Police may deny a license. His duty, under the ordinance, is to make an investigation and a report of such investigation to the City Manager. (Note that A.C.I. has not alleged an invasion of privacy but only vagueness.)

Regardless of the content of the Chief's report, the standard for council review is "good character as a law abiding citizen."

Review is then provided to the State District Court, who, of course, would be bound by the standa. l employed by the City Council, not the standard employed by the Police Chief. The district court can then review the evidence as to "good character as a law abiding citizen" without giving consideration to any "connection with criminal elements" as was actually done by the Texas Supreme Court in *The City of Mesquite v. Aladdin's Castle,* 570 S.W. 2d 377 (Tex. 1978),

> "The denial of the license was not reasonably supported by substantial evidence. We do not reach the question of the constitutionality of the ordinance."

Thus, Aladdin's Castle, Inc. was not required to take any action or refrain from taking any action by reason of the challenged language. Only the Chief of Police was required to act and he does not contend that he does not understand the language.

Further, at the time of trial A.C.I. had been issued a license and had no application pending. There was no showing that they would be adversely affected by the language, particularly considering that the State Court had mandated the issuance of a license.

Therefore, Respondent's only complaint is about an intelligence gathering requirement of the Chief of Police exactly as that complained of in *Laird v. Tatum,* 408 U.S. 1, (1972).

This court quoted in the above case from ***Ex Parte Levitt,*** **302 U.S. 633, 634, (1937) at 408 U.S. 13,**

> ". . . established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained, or is immediately in danger of sustaining, a direct injury as the result of that action. . . ."

and, same page,

> "The respondents do not meet this test."

Like the respondents in *Laird v. Tatum,* Supra, Appellee herein disagrees with the requirement because they do not want the substantive information revealed by the investigation to be learned. Once the investigation is made and the information is available it will then be considered in its actual context; not in the terms of the ordinance language.

This, then, would be the evidence the applicant would have to refute and there is nothing vague about the actual evidence. How the Police Chief was instructed to obtain it, by vague language or otherwise is not a judicial question. *Laird v. Tatum,* Supra.

Appellee therefore had no standing to question the manner of the Council's instruction to the Chief of Police as to how to perform his duties as a license may be and actually was issued without the consent or approval of the Chief of Police. *The City of Mesquite v. Aladdin's Castle,* Supra.

City concedes that if Appellee had alleged violation of the right of privacy in the trial court, its standing would have been enhanced though still foreclosed by *Laird v. Tatum,* but where no such right is alleged and the only complaint is vagueness, its claim of standing is frivolous.

VAGUENESS

The same misinterpretation of the ordinance pointed out under the question of standing applies equally to this question. If the term, "connections with criminal elements" was set up as a standard for which the council and the State courts must judge an applicant's right to a license it must at least be precise enough so that those charged with the responsibility of review would know what standards to apply. But such is not the case. Review, as heretofore demonstrated, is upon the standard of good character as a law abiding citizen. In the context in which it is used it adequately informs the Chief of Police as to what his duties are.

But even were the term established as a standard for determining the eligibility of an applicant for a license, which it is not, it is not unconstitutionally vague as a business regulation. *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, (1952).

The court below erroneously relied upon cases construing criminal statutes, some of which touched upon First Amendment rights of speech. *Smith v. Goguen,* 415 U.S. 566, (1974) relied upon by the court below, states, 415 U.S. at 573,

> "Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts."

This court stated in *Papachristou v. City of Jacksonville,* Supra, 405 U.S. 156 at 162,

> "In the field of regulatory statutes governing business activities, where the acts are in a narrow category, greater leeway is allowed."

In *Grayned v. City of Rockford*, 408 U.S. 104, (1972) this court upheld a criminal statute because of its requirement that the noise be actually incompatible with normal school activity.

The instant ordinance requires that the relationship be incompatible with the protection of those of tender years (J.A. 86-7).

> ". . . . to the extent that the fencing of stolen merchandise of illegally obtained funds, the procuring of prostitutes, the transfer or sale of narcotics or illegal substances is made more feasible or likely."

The court below was of the opinion that an individual would be unable to measure this "extent". Again, this court stated in *Grayned v. City of Rockford*, Supra, 408 U.S. at 112,

> "Although the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's *announced purpose* that the measure is whether normal school activity has been or is about to be disrupted."

When one examines the Section of the ordinance designated "Legislative Policy" (J.A. 87-8) it will readily be noted that the announced purpose of the ordinance limits and clarifies the language as in *Grayned*, Supra.

Therefore, the cases relied upon by the court below are inapplicable to the instant case and the provision should be upheld as a legitimate direction to the Chief of Police and as legitimate legislative policy.

CONCLUSION

For the reasons shown herein, the judgment of the court below should be reversed. In the alternative, should it be determined that the "strict scrutiny" test is applicable, the case should in the interest of justice be remanded to the trial court for a more complete development of the facts under the more stringent test.

Respectfully Submitted,

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No. 80-1577

In the Supreme Court of the United States

OCTOBER TERM, 1981

CITY OF MESQUITE,

Appellant,

v.

ALADDIN'S CASTLE, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Statement Pursuant to Supreme Court Rule 28.1.

Aladdin's Castle, Inc. is the wholly owned subsidiary of Bally Manufacturing Corporation. The only subsidiary of Alladin's that is not wholly owned is American Amusements of Arkansas, Inc. Aladdin's has no affiliates other than as stated herein.

QUESTIONS PRESENTED FOR REVIEW

The Age Restriction Claim

1. Whether 28 U.S.C. § 1254(2) confers upon this Court jurisdiction of the age restriction claim notwithstanding the existence of independent and adequate state law bases for the Court of Appeals' judgment on that claim, and, if not, whether the Court, treating the jurisdictional statement as a petition for certiorari, should deny certiorari.

2. Whether, if this Court exercises its certiorari jurisdiction to consider the age restriction claim, the judgment should be affirmed on one or more of the following Texas law grounds:

(a) The age restriction violates the equal protection guarantee of the Texas Constitution by drawing an unreasonable distinction between coin-operated amusement centers, which are subject to the age restriction, and other amusement establishments, which are not.

(b) The age restriction violates the due process clause of the Texas Constitution by arbitrarily denying Appellee the use of its leasehold interest and the chattels therein.

(c) The age restriction is a prohibitive regulation in violation of the Texas Constitution.

(d) The City of Mesquite, by its conduct, is equitably estopped under Texas law to enforce the age restriction against Appellee.

3. Whether the classifications made by the age restriction provisions are invidious and irrational and thus violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

4. Whether the age restriction infringes, without compelling reason, the fundamental rights of expression and association, and therefore violates both the First Amendment and the equal protection clause of the Fourteenth Amendment to the United States Constitution.

The Licensing Claim

5. Whether the licensing standard of "connections with criminal elements," even with its accompanying definition, is void for vagueness.

6. Whether Mesquite's repeal of the "connections with criminal elements" language, though voluntary, nonetheless renders the vagueness claim moot.

7. Whether the Court, in order to do justice in this case, should dismiss the appeal, but permit the judgment to stand, if it finds the vagueness claim moot.

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CONSTITUTIONAL AND STATUTORY PROVISIONS CONSTRUED

In addition to the provisions mentioned by Mesquite, this case involves Mesquite Ordinance No. 1410, which is included in the Appendix to this brief, and the following United States and Texas constitutional provisions:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, First Amendment.

> All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

Texas Constitution, art. 1, § 3.

> No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

Texas Constitution art. 1, § 19.

> Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at any election held for that purpose, adopt or amend their charters, subject to such

limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State; and cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half per cent. of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent. thereon; and provided further, that no city charter shall be altered, amended or repealed oftener than every two years.

Texas Constitution art. 11, § 5.

In the
Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1577

CITY OF MESQUITE,

Appellant,

v.

ALADDIN'S CASTLE, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Course of Proceedings Below

Appellee, Aladdin's Castle, Inc., brought this action in the United States District Court for the Northern District of Texas challenging on federal and state grounds the validity of certain provisions of an ordinance of the City of Mesquite, Texas. (J.A. ii, 1-11; S.A. 32.)[1] These provi-

[1] References to the Joint Appendix are designated "J.A." References to the Supplemental Appendix are designated "S.A."

sions prohibited children under 17 years of age from playing coin-operated amusement games unless accompanied by a parent or legal guardian (J.A. 81, 1-11) and set forth, as a standard to be considered in licensing owners of coin-operated amusement games, whether the owner had "connections with criminal elements." (J.A. 82, 109-12.) After trial, the District Court sustained the age restriction but held that the "connections with criminal elements" language violated federal due process because of vagueness. 434 F. Supp. 473 (S.A. 32-41).

Both parties appealed to the United States Court of Appeals for the Fifth Circuit. In a unanimous opinion, that Court affirmed the judgment of the District Court on the "connections with criminal elements" claim and reversed on the age restriction claim, holding that restriction invalid under both the state and federal constitutions. 630 F.2d 1029 (S.A. 1-31). Mesquite's suggestion for rehearing en banc in the Court of Appeals was denied. (J.A. 158.) Mesquite appealed to this Court, which noted probable jurisdiction on May 18, 1981.

Statement of Facts

Background of Aladdin's

At the time of trial in 1977, Aladdin's owned and operated approximately 100 family amusement centers, all of which are located in enclosed suburban shopping malls. (J.A. 28-29.) They contain a variety of visual-audio, coin-operated amusement devices. (S.A. 2.) The company's program of establishing and operating coin-operated, family amusement centers in typical suburban, multi-million dollar enclosed shopping malls was conceived in 1969, and has proven to be very successful. (J.A. 26-27.)

In keeping with their surroundings, the centers are maintained as wholesome places of entertainment, with

tasteful decor and a trained adult attendant on duty at all hours. (J.A. 27, 35.) Each center's hours conform to those of the shopping mall in which it is located. No smoking, food, or beverages of any kind are allowed in the centers, and loitering is prohibited. (J.A. 35, 123.) Aladdin's' center in Mesquite also enforces a rule that bars school-age children from playing the games during school hours. (J.A. 152; S.A. 2.) The enforcement of these rules has contributed greatly to Aladdin's' success. (J.A. 35.)

In April of 1974, Aladdin's was acquired by Bally Manufacturing Corporation ("Bally"), a publicly held company that is traded on the New York Stock Exchange. (J.A. 28.)

NEGOTIATIONS IN MESQUITE

Aladdin's began negotiations in 1975 for opening a center in the Town East Mall in Mesquite. (J.A. 29; S.A. 2.) During negotiations the company discovered two legal obstacles. One was Mesquite's Ordinance No. 1103, which, in addition to making it unlawful to operate a coin-operated amusement establishment without a license, prohibited owners of such establishments from allowing

> any person under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless such minor is accompanied by a parent or legal guardian.

(J.A. 29, 75; S.A. 2.) Because the majority ot those who play the games in Aladdin's' centers are minors, such a restriction precludes profitable operation. (J.A. 125.) The second obstacle was that the Town East Mall was not properly zoned for Aladdin's' business use. (J.A. 29.)

In the spring of 1976, at the request of Aladdin's, the City Council removed these obstacles. (J.A. 29.) First, the City Council amended Ordinance No. 1103 by lowering the age restriction to "under the age of seven" for those coin-operated establishments

> located in major shopping centers containing an enclosed mall and said establishments being operated only during the hours said mall is open and having no outside entrance and where said establishments does [sic] not offer for sale or allow the consumption of food, drink or other merchandise.

(J.A. 73.) Second, the City Council amended the city zoning map to allow the operation of coin-operated amusement games within the Town East Mall. (J.A. 69.) No license was to be issued until the company had finished installing its center. (J.A. 29; S.A. 3, 33.)

In reliance upon the City Council's actions, Aladdin's leased space in the Town East Mall and began paying rent in July of 1976. (J.A. 31.) The lease was for ten years at a monthly rental of approximately $2,400, for a total contract amount of some $292,000. (J.A. 152-53; S.A. 4.) In addition, the company spent about $45,000 for leasehold improvements and another $45,000 for equipment and shipping costs. (J.A. 32.)

Mesquite's Denial of the License

When the center was ready for business, Aladdin's applied for a license pursuant to Ordinance No. 1103, as amended. On July 20, Mesquite's city manager, without explanation, refused to issue the license. (J.A. 103; S.A. 4-5, 34.) When Aladdin's appealed to the City Council (J.A. 103), it was advised that the license application had been denied because of the results of a police investigation under the licensing provisions of Ordinance No. 1103, which authorized denial of a license based on the recommendation of the chief of police, which in turn was based on his determination, *inter alia*, of whether the applicant had "connections with criminal elements." (J.A. 76.) The police officer conducting the investigation learned that the stock of Aladdin's was owned by Bally, which at one time

had been indicted for racketeering and gambling activities but had been acquitted of the charges. (J.A. 104.) He decided that Bally was somehow linked to the "Mafia." (J.A. 104; S.A. 34.) On the basis of the investigation the Mesquite chief of police determined that Aladdin's had "connections with criminal elements," and recommended against issuance of a license. The decision of the City Council to deny the license was made in reliance on that recommendation. (J.A. 104.)

STATE COURT PROCEEDINGS

Aladdin's brought suit in Texas state court, in accordance with the procedure set forth in Ordinance No. 1103 (J.A. 77), seeking a mandatory injunction requiring Mesquite to issue it a license. (J.A. 104.) Mesquite's denial of a license was challenged not only on the ground that there was no evidence that Aladdin's or Bally had any "connections with criminal elements," but also on the ground that that phrase was unconstitutionally vague. After an evidentiary hearing, the state court found in favor of Aladdin's on both grounds.[2] (J.A. 102-07.) It specifically found that "no evidence exists whatsoever to prove that Bally Manufacturing Company is controlled or directed by or connected with any criminal elements of any kind whatsoever." (J.A. 105.) The state court also held that the phrase

> 'connections with criminal elements' is vague and indefinite for the reason that such language fails to apprise an applicant of what may constitute forbidden

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[2] The state district court's decision was affirmed in its entirety by the Texas Court of Civil Appeals. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 559 S.W.2d 92, 94-95 (Tex.Civ.App. 1977). The case was subsequently appealed to the Texas Supreme Court, which affirmed on the facts and did not reach the vagueness issue. 570 S.W.2d 377, 378 (Tex. 1978).

> 'connections' or what may constitute 'criminal elements.' I further conclude that 'connections with criminal elements' is void for the reason that such term is overbroad in that the word 'connections' sweeps within its meaning conduct and associations that are lawful. . . .

(J.A. 106.)

Pursuant to the state court's injunction, Mesquite issued a license to Aladdin's. (S.A. 85.) The company again prepared for business and finally opened on February 5, 1977. (J.A. 34.)

ORDINANCE No. 1353

Two days later, the Mesquite City Council enacted Ordinance No. 1353. This ordinance revived the age restriction of Ordinance No. 1103, making it a misdemeanor for "any owner, operator or displayer of coin-operated amusement machines to allow any person under the age of seventeen" to play or operate the machine unless accompanied by a parent or legal guardian. (J.A. 81.) The new ordinance retained the "connections with criminal elements" standard, but this time the City Council attempted to define the phrase.[3] (J.A. 84-85.)

Mesquite has candidly admitted why its City Council reversed itself on its commitment to Aladdin's. It stated to the Court of Appeals that Aladdin's had

> conceal[ed] from the City the fact that Aladdin's was wholly owned by Bally Manufacturing Company, a company formerly, if not currently, owned in part by the notorious Jerado Catena [sic].
>
> When this fact was ferreted out by the police department, a permit to operate was denied.
>
> * * *
>
> Based upon these facts and the knowledge that the State Court would not allow the City to deny a per-

[3] The definition appears at pp. 43-44 n.27, *infra*.

> mit . . . the City Council repented of their earlier action and disbelieved the assurances of Aladdin's Castle, Inc., that it would safeguard the interests of the minors without parental supervision and repealed the earlier ordinance. . . .

(Suggestion for Hearing En Banc in Ct. of App. 1-2.) The state court had already found, after an evidentiary hearing, not only, as noted above, that there was no evidence to prove that Bally was connected with any criminal element, but also that Gerardo Catena "has no relationship" with Bally. (J.A. 105.) There is no evidence in the record that Aladdin's concealed the name of its corporate parent from Mesquite. Inasmuch as Bally is a publicly held company listed on the New York Stock Exchange, the identity of its subsidiaries is public information available in most libraries.

THE PENDING LITIGATION

Aladdin's filed this action on February 11, 1977. (J.A. ii.) The original complaint sought injunctive relief only against enforcement of the age restriction of Ordinance No. 1353 (J.A. 1-11), but was subsequently amended to include a challenge to the "connections with criminal elements" standard. (J.A. 109-112.)[4]

Following a trial on the merits, the District Court, in an opinion issued on June 29, 1977, found the city's justifications for the age restriction "incredibly slender reeds upon which to base an ordinance," but nonetheless upheld

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[4] A motion for leave to file the amendment was filed on June 6, 1977, four days before trial (J.A. ii) and not on the day of trial, as contended by Mesquite in its brief. (Appnt's Br. 3). On the day of trial, the District Court offered Mesquite the opportunity for a continuance because of the amendment, but the city declined. (Hearing on Permanent Injunction (June 10, 1977) 9-10, 13.)

the restriction as within the city's police power. 434 F. Supp. at 477 (S.A. 38). The court held that the "connections with criminal elements" portion of the ordinance, even with its accompanying definition, was void for vagueness under the due process clause of the Fourteenth Amendment. *Id.* at 476 (S.A. 37). Both parties appealed.

The Court of Appeals affirmed on the vagueness claim and reversed on the age restriction claim. 630 F.2d 1029 (S.A. 1-31). As to the latter, the court found a denial of due process and equal protection under the state and federal constitutions. *Id.* at 1038-44 (S.A. 15-26).

The Court of Appeals was not aware, and Mesquite's brief does not advise this Court, that during the pendency of the appeal, in December of 1977, Mesquite enacted an ordinance, Ordinance No. 1410 (App. to this Br.), that repeals Ordinance No. 1353, upon which the District Court ruled. The new ordinance re-enacts the same age restriction contained in Ordinance No. 1353 but does not contain the phrase "connections with criminal elements."

SUMMARY OF ARGUMENT

Because the judgment of the Court of Appeals on the age restriction claim is supported by independent and adequate Texas law grounds, a decision by this Court on the federal issues under 28 U.S.C. § 1254(2), which prohibits the Court from considering state law issues, would be purely advisory. Deciding the case under section 1254(2) would also deprive the Court of the opportunity to avoid adjudication of the constitutional issues by examining the other issues first. As to the age restriction claim, therefore, the appeal should be dismissed, and the Jurisdictional Statement should be treated as a petition for certiorari. In view of the existence of the adequate state grounds, certiorari should be denied.

If, however, the Court decides to review the case by granting certiorari, it should reach the state law grounds first and affirm on those grounds. The state law grounds include the age restriction's invalidity under the Texas equal protection and due process clauses, its violation of Texas law forbidding the enactment of prohibitive regulations, and Texas law of estoppel.

The age restriction also violates the equal protection clause of the Fourteenth Amendment. Under a rational basis analysis, the restriction is invalid because it was invidiously motivated. In addition, it irrationally imposes on owners of coin-operated game centers a burden not imposed on owners of other commercial amusement centers although both are identically situated so far as the purposes of the ordinance are concerned, fails to distinguish between lawfully and responsibly operated centers and other centers, and imposes a restriction on persons under seventeen that is not rationally related to the legislative purpose. It therefore unconstitutionally discriminates against owners of coin-operated games and children under seventeen. In addition, the restriction abridges fundamental rights of expression and association of children under seventeen and the right of expression of the authors of the games without adequate justification and thereby violates their First Amendment and equal protection rights.

The licensing standard "connections with criminal elements" and its definition violate the due process clause of the Fourteenth Amendment because of vagueness. The vagueness issue is not mooted by the repeal of the challenged provision, because of the likelihood that a violation will recur and because the effects of the past violation are continuing. Even if the Court were to hold the claim moot, the judgment appealed from should be allowed to stand.

ARGUMENT

I.

AS TO THE AGE RESTRICTION CLAIM, THIS COURT SHOULD DISMISS THE APPEAL AND DENY CERTIORARI, BUT, IF THE MERITS ARE REACHED, THE JUDGMENT SHOULD BE AFFIRMED ON STATE LAW GROUNDS.

The judgment of the Court of Appeals as to the age restriction claim is supported by adequate Texas law grounds as well as federal constitutional grounds. The statute on which this Court's jurisdiction is based, 28 U.S.C. § 1254(2), prohibits this Court from considering the state law grounds.[5] A decision by this Court on the federal issues would therefore be purely advisory. Accordingly, the appeal should be dismissed and, pursuant to 28 U.S.C. § 2103, the jurisdictional statement should be treated as a petition for certiorari. In view of the existence of the adequate state grounds, certiorari should be denied. If the Court were to proceed with review on certiorari and consider the case on the merits, it should reach the state law grounds first and affirm the judgment on those grounds.

A. Because The Judgment Is Supported By Independent And Adequate State Law Grounds, This Court Lacks Appellate Jurisdiction Under 28 U.S.C. § 1254(2). Treating The Jurisdictional Statement As A Petition For Certiorari, The Court Should Deny Certiorari.

The Court of Appeals expressly held that the age restriction violates the due process and equal protection

[5] 28 U.S.C. § 1254(2) provides in part that "the review on appeal shall be restricted to the Federal questions presented."

clauses of the Texas Constitution. 630 F.2d at 1038-39. In addition, Aladdin's presented arguments that the Court did not reach, *viz.*, that the age restriction constitutes a prohibitive regulation beyond the power of the municipality to adopt under Texas law, and that the city is estopped under Texas law from enforcing the restriction against Aladdin's. See Brief for Appellant in Court of Appeals at 15-20, 24-25. The District Court reached the estoppel question but ignored the other state law issues. 434 F. Supp. at 478.

This Court will affirm on any adequate ground that finds support in the record, whether or not the court below relied on or even considered that ground. *Dandridge* v. *Williams*, 397 U.S. 471, 475-76 n.6 (1970). Thus, Aladdin's normally could rely for affirmance on the adequate state grounds, including those on which the Court of Appeals did not rule.[6] Under 28 U.S.C. § 1254(2), however, this Court may consider only the federal grounds upon which the Court of Appeals held Mesquite's ordinance invalid. It would be anomalous indeed if, by invoking section 1254 (2) as the basis for jurisdiction, a party could preclude this Court from reaching the independent and adequate state grounds that support the Court of Appeals' judgment.[7]

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[6] Inasmuch as Aladdin's does not seek to change the judgment, it was not required to petition for certiorari in order to preserve its right to argue the independent state law grounds that the Court of Appeals did not consider. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 478 (5th ed. 1978).

[7] This Court never has decided the issue addressed in the text, *viz.*, whether the existence of independent and adequate state grounds negates appellate jurisdiction under section 1254(2). *See* 12 MOORE'S FEDERAL PRACTICE ¶ 435.01 [1], at 6-53 (1981). The question was posed but not answered in *Meridian* v. *Southern Bell Telephone & Telegraph Co.*, 358 U.S. 639, 640-41 (1959).

The reason such a result cannot occur is that, as Chief Justice Hughes pointed out in his opinion for the Court in *United States* v. *Hastings*, 296 U.S. 188, 193 (1935), when a judgment is supported by an adequate ground that this Court cannot review, a ruling by this Court on another ground would be purely advisory. In *Hastings*, the government appealed from an order in a criminal case under a statute (former 18 U.S.C. § 682) allowing an appeal by the government when the District Court's order dismissing an indictment was based on "the invalidity or construction of the statute upon which the indictment is founded." The Court, in explaining why it was necessary to consider whether the order appealed from was also supported by grounds other than the invalidity or construction of the statute, reasoned that, if the order was so supported, the decision the Court was asked to make concerning the validity of the statute would be "an expression of an abstract opinion." The Court also said:

> Review of a judgment which we cannot disturb, because it rests adequately upon a basis not subject to our examination, would be an anomaly.

Id. at 193.

The Court also pointed out that in the analogous situation of an appeal under what is now 28 U.S.C. § 1257(2), when the state court's judgment is supported by an adequate state ground, and hence would not be affected by the Court's decision on the federal ground, the appeal would be dismissed. *Id.*[8]

The "close relationship" between sections 1254(2) and 1257(2) suggests that the same principles that gov-

[8] Section 1257(2) has long been held not to confer jurisdiction to review state court decisions that are supported by independent and adequate state law grounds. *Michigan* v. *Tyler*, 436 U.S. 499, 512 n. 7 (1978). *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 634-35 (1875).

ern jurisdiction under one section generally should obtain under the other as well. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 675-77 n.11 (1974), *citing* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 277-78 (1928). Under these principles, any decision of the federal constitutional issue by this Court in this case would be advisory, in light of the existence of independent and adequate state grounds that this Court is forbidden to consider by 28 U.S.C. § 1254(2).

Moreover, if the appeal were allowed under section 1254(2), the Court would be denied the opportunity to attempt to avoid adjudication of the federal constitutional issues by examining the other issues first. While not a concern of Article III magnitude, as is the prohibition of advisory opinions, the avoidance of federal constitutional adjudication when there potentially are alternative grounds for decision long has been a cornerstone of this Court's jurisprudence. *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 582-83 n.22 (1979); *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347-48 (1936) (Brandeis, J., concurring).

For these reasons, the Court should conclude that "[i]f there is any state question that could dispose of the case independently, there is no appeal jurisdiction." 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: Jurisdiction § 4037, at 45 (1978 ed.). See also R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 65-66 (5th ed. 1978); H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1580 (2d ed. 1973).

The appeal should therefore be dismissed as to the age restriction, and, as to that claim, the jurisdictional statement should be treated pursuant to 28 U.S.C. § 2103 as a petition for certiorari. *Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970); see R. STERN & E. GRESSMAN 66.

Treated as such, the petition should be denied, as are other petitions for certiorari seeking review of judgments supported by adequate state law grounds. *Id.* at 271-72, 285-86. To decide the case on the merits, the Court would be required to decide issues of Texas common law and Texas constitutional law before reaching the federal constitutional questions, an undertaking which would be an improvident allocation of this Court's limited resources.

If, however, the Court decides to grant certiorari, it should consider first the state law challenges to the age restriction and, for the reasons that follow, should find them sufficient to sustain the judgment of the Court of Appeals.[9]

B. The Age Restriction Is Invalid Under Texas Law.

1. The Age Restriction Violates The Texas Constitutional Guarantees Of Equal Protection and Due Process.

As the Court of Appeals expressly held, Mesquite's seventeen-year old age restriction violates Texas constitu-

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[9] Aladdin's' vagueness claim presents wholly separate issues under a distinct and separable provision of the Mesquite ordinance. Thus, that claim is properly before the Court under section 1254(2). If, however, the Court were to view the vagueness claim as inseparable from the age restriction claim, the presence of unreviewable independent state law grounds on the age restriction issue would prevent review of the vagueness claim under section 1254(2). By treating the jurisdictional statement as a petition for certiorari as to the vagueness challenge as well, the Court could deal properly with both claims. If so treated, the petition also should be denied as to the vagueness claim, inasmuch as the judgments of the District Court and the Court of Appeals as to that issue clearly are correct applications of principles well-settled by the decisions of this Court. See Point III, *infra*.

tional guarantees of both equal protection and due process of law. 630 F.2d at 1038-39. Each of these grounds independently supports the judgment.

(a) Equal Protection.

The equal protection clause of the Texas Constitution guarantees that "[a]ll free men, when they form a social compact, have equal rights." TEX. CONST. art. 1, § 3. A regulation challenged under this provision must have a legitimate public purpose based on promotion of the public welfare, health, or safety, *Falfurrias Creamery Co.* v. *City of Laredo*, 276 S.W.2d 351 (Tex.Civ.App. 1955), and must bear a rational relation to the end it seeks to further. *San Antonio Retail Grocers, Inc.* v. *Lafferty*, 156 Tex. 574, 297 S.W.2d 813 (1957). While the State has broad discretion in the exercise of its power of regulation to classify consistent with the constitutional guarantee, "it is also a rule of law that in order to be valid all persons or things within a particular class or similarly situated must be affected alike." *Taylor* v. *State*, 513 S.W.2d 549, 551 (Tex. Crim.App. 1974). Unequal treatment of persons that is founded upon an unsubstantial or arbitrary classification constitutes unlawful discriminatory state action. *Rucker* v. *State*, 170 Tex. Crim. 487, 342 S.W.2d 325 (1961). Mesquite's age restriction fails to satisfy these requirements of the Texas Constitution.

The lack of rational relationship between the classifications made by the age restriction and the purported purpose of preventing persons under seventeen from being exposed to corrupting influences, truancy, and excessive spending is more fully discussed at pp. 22-28, *infra*. The age restriction violates the Texas equal protection clause by singling out coin-operated amusement game centers and ignoring other amusement centers and establishments that attract the same clientele and present the same potential problems. See pp. 25-26, *infra*.

This conclusion is well supported by decisions of the Texas courts construing the Texas clause. In *San Antonio Retail Grocers, Inc.* v. *Lafferty*, 156 Tex. 574, 297 S.W.2d 813 (1957), for example, the Texas Supreme Court struck down a state statute that prohibited only grocery stores from selling merchandise below cost, holding that the statute unreasonably and arbitrarily exempted other stores that sold similar or identical items. Similarly, in *Taylor* v. *State*, 513 S.W.2d 549 (Tex.Crim.App. 1974), the court found unconstitutional an occupation fee on establishments of $10 for each coin-operated amusement machine, with a minimum fee of $50 and maximum fee of $3,000, holding that the minimum and maximum fees arbitrarily discriminated against small operators and in favor of large operators. And in *Rucker* v. *State*, 170 Tex. Crim. 487, 342 S.W.2d 325 (1961), the court struck down on equal protection grounds an ordinance that imposed a trespassing fine of $25 on peddlers but a fine of $200 on all other persons.

In the case at bar, no reasonable and substantial distinction exists between coin-operated game centers and other amusement establishments that would justify disparate application of the age restriction. The ordinance is therefore void under the Texas Constitution.

(b) *Due Process.*

Ordinance No. 1353 also denies Aladdin's due process of law under the Texas Constitution. Tex. Const. art. 1, § 19. As discussed at pp. 18-20, *infra*, the evidence shows that the ordinance, by precluding profitable operation, would effectively prevent Aladdin's from operating in Mesquite. Its business being a lawful one, Aladdin's has a right to conduct it without injurious interference by Mesquite. In *Sam's Loan Office, Inc.* v. *City of Beaumont*, 49 S.W.2d 1089 (Tex. Com. App. 1932), the court invalidated on state due process grounds an ordi-

nance that made it difficult, if not impossible, to conduct an auctioneering business within the city, stating:

> Since the right to sell goods at auction is a valuable one, duly licensed and protected under the laws of this state, it follows that it is a right duly protected under the above constitutional provision. [TEX. CONST. art. 1, § 19.] Also, since such is the case, and since the city only has the delegated power to regulate, it further follows that the city is without power to either directly or indirectly prohibit such business, or adopt any regulation which will produce such result, or even be unduly oppressive or highly injurious thereto, and any ordinance in contravention of the above rule is condemned by the above constitutional provision.

Id., at 1091.

Other Texas cases have also struck down, on state due process grounds, regulations that had the effect of prohibiting lawful businesses: *Ex parte Mihlfread*, 128 Tex. Crim. 556, 83 S.W.2d 347 (1935) (ordinance levying annual $50 fee for each solicitor employed by photographers); *Bielecki* v. *City of Port Arthur*, 12 S.W.2d 976 (Tex. Com. App. 1929) (ordinance declaring any structure used as a public dance hall to be a nuisance if located within 150 feet of a private dwelling) (*see also Ex parte Spelce*, 135 Tex. Crim. 367, 119 S.W.2d 1037 (1938)); *Murphy* v. *Wright*, 115 S.W.2d 448 (Tex.Civ.App. 1938) (ordinance restricting proximity of dance halls to occupied buildings—alternative ground); *Dibrell* v. *City of Coleman*, 172 S.W. 550 (Tex. Civ. App. 1914) (ordinance banning the keeping of hogs within city limits).

Like the ordinances in the foregoing cases, the age restriction provision here has the effect of prohibiting an otherwise lawful business and lawful use of property therein, and therefore deprives Aladdin's of property interests without due process of law in violation of the Texas Constitution.

2. BECAUSE THE AGE RESTRICTION MAKES IT IMPOSSIBLE FOR ALADDIN'S TO CONTINUE PROFITABLE OPERATION, IT VIOLATES WELL-ESTABLISHED TEXAS LAW FORBIDDING MUNICIPALITIES FROM ENACTING PROHIBITIVE REGULATIONS. IN ADDITION, MESQUITE IS EQUITABLY ESTOPPED FROM ENFORCING THE RESTRICTION.

Two other state law grounds, each of which independently supports the judgment, were argued but not ruled upon in the Court of Appeals.

(a) *Prohibitive Regulation.*

As a "home rule" city, Mesquite is authorized by Texas law to "regulate the location and control the conduct of" establishments such as Aladdin's. TEX. STAT. ANN. art. 1175, § 22 (Vernon 1963). Mesquite may not do so, however, in a manner "inconsistent with the Constitution of the State, or the general laws enacted by the Legislature of this State." TEX. CONST. art. 11, § 5. Accordingly, any municipal regulation prohibiting an activity permitted by state law violates this constitutional provision. *Berry* v. *City of Fort Worth*, 132 Tex. 599, 124 S.W.2d 842 (1939); *Ex parte Powell*, 43 Tex. Crim. 391, 66 S.W. 298 (1902); *Alpha Enterprises, Inc.* v. *City of Houston*, 411 S.W.2d 417 (Tex.Civ.App.), *cert. denied*, 389 U.S. 1005 (1967); *City of Fort Worth* v. *Atlas Enterprise*, 311 S.W.2d 922 (Tex. Civ.App. 1958); *City of Fort Worth* v. *McDonald*, 293 S.W.2d 256 (Tex.Civ.App. 1956). In the *McDonald* case, an ordinance prohibiting pinball machines based on the City Council's finding that they "encourage idleness, loafing, vagrancy, and gambling" was invalidated as inconsistent with Texas state law permitting the operation of pinball games. *Id.* at 258.

A municipality may not accomplish the prohibition indirectly, by making establishments unprofitable through

onerous regulation. *Ex parte Ogden*, 43 Tex. Crim. 531, 66 S.W. 1100 (1902); *Ex parte Patterson*, 42 Tex. Crim. 256, 58 S.W. 1011 (1900). For example, in *Ex parte Powell*, the court struck down a city ordinance which imposed a fine on selling horse racing pools as inconsistent with Texas law, which not only permitted but also taxed the enterprise. In *Ogden*, the court struck down a different section of the same ordinance which, while it did not prohibit the selling of pools entirely, permitted their sale only at certain designated locations. The court held that since the selling of pools was "a legitimate business—one legalized by the state—the City could not, even in this indirect manner, inhibit it." 66 S.W. at 1101.

In the case at bar, the same elements of a violation of the Texas Constitution, art. 11, § 5, are present. It is undisputed that Texas law permits the operation of coin-operated games.[10] The prohibitive impact of Mesquite's age restriction also is beyond question. The evidence shows that, because the majority of Aladdin's customers are minors, application of the age restriction would cause Aladdin's to operate at a loss. (J.A. 125). As the Court of Appeals stated:

> [t]he city council thus reenacted the age restriction it had previously eliminated at Aladdin's request. The earlier contacts between Aladdin's and the city council indicate that the council knew that this change would clearly make Aladdin's Mesquite center unprofitable and force it to close. In short, Mesquite achieved the result denied it by the state court judgment.

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[10] Games that allow free plays are permissible under the cited provision so long as the free plays are "an unrecorded and immediate right to replay not exchangeable for value." TEX. PENAL CODE ANN. tit. 4, § 47.01(8) (Vernon 1974). The state has recognized the legitimacy of coin-operated games by imposing an operating tax on them. TEX. TAX-GEN. ANN. art. 13.02 (Vernon 1975).

630 F.2d at 1035. The age restriction is therefore an indirect prohibition of a legitimate enterprise, and as such invalid under Texas law.

This ground of invalidity was fully briefed in the courts below and "involves the application of settled legal principles to uncontroversial facts." *New York City Transit Authority* v. *Beazer*, 440 U.S. 568, 583-84 n.24 (1979). Therefore, if this Court reaches the merits it should sustain the judgment with respect to the age limitation on this ground.

(b) *Equitable Estoppel.*

Mesquite is equitably estopped, under Texas law, to enforce the ordinance because of conduct by Mesquite that the Court of Appeals described as "a very unpleasant story." 630 F.2d at 1044. Mesquite amended its ordinances to permit the Aladdin's center and to remove the age restriction, knowing that Aladdin's would invest large sums in reliance on that action, and then, after Aladdin's had done so, changed its ordinances to reinstate the age limitations and thereby effectively prohibit Aladdin's from operating profitably.[11]

Under Texas law, Mesquite is subject to a plea of estoppel based on its action in this case. The Texas courts long have recognized that "a municipality may be estopped in those cases where justice requires its application, and there is no interference with the exercise of its governmental functions." *City of Hutchins* v. *Prasifka*, 450 S.W.2d 829, 836 (Tex. 1970). *See also City of San Angelo* v. *Deutsch*, 126 Tex. 532, 91 S.W.2d 308 (1936); *City of Cuero* v. *Tupper-Texas, Inc.*, 226 F.2d 121 (5th Cir. 1955) (apply-

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[11] Moreover, Mesquite has admitted that the real reason for the imposition of the age limitations was its stubborn and unfounded belief, contrary to the findings of the state court, that Bally, the parent corporation of Aladdin's, had "connections with criminal elements." *Supra*, pp. 6-7.

ing Texas law). The Court of Appeals' statement of the pertinent facts shows why application of an estoppel is appropriate in this case:

> (1) the business, acting in good faith and with full disclosure, informs the municipality of its plans, (2) the municipality encourages the business in a significant manner, such as by amending existing legislation, (3) the business detrimentally relies on that encouragement, and (4) no conditions, including the composition of the city council and the local political climate, have changed.

630 F.2d at 1044.

Mesquite's conduct is similar to that successfully challenged in the *City of Cuero* case, in which the court found that the party dealing with the city had relied to its detriment upon the city's delivery of a deed and passage of certain ordinances, and the city had not attacked the validity of the deal until after reasonable reliance on those actions.

City of Dallas v. *Rosenthal*, 239 S.W.2d 636, 645 (Tex. Civ.App. 1951), also holds a municipality equitably estopped on similar facts. There, although a property owner had exceeded the permission granted in a building permit, the court held that the city's awareness of the nonconformance estopped it from enjoining use of the premises. The estoppel was based upon the city's inaction in the face of the citizen's unauthorized construction, and was effective even though the city was acting in its governmental capacity. *Rosenthal* is thus strong precedent for finding estoppel here, where Aladdin's' action to its detriment was fully authorized by city ordinances. The judgment of the Court of Appeals should be affirmed on this additional state law ground.

II.

THE AGE RESTRICTION VIOLATES RIGHTS PROTECTED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

If this Court reaches the federal constitutional issues, it should hold that the ordinance violates the equal protection clause of the Fourteenth Amendment. This is so whether the Court applies the test of rational relationship of the classification to a legitimate state purpose or the strict scrutiny test applicable when a fundamental right is involved.

A. The Provision Bears No Rational Relationship To A Legitimate State Purpose.

In the rational relationship test, the relevant relationship is, of course, between the classification and the legislative purpose, *see, e.g., Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 312 (1976), not, as Mesquite appears to assume in its brief, between the restriction and the purpose. The ordinance makes two classifications that are pertinent here: (1) between owners of coin-operated game centers and owners of other commercial amusement establishments, and (2) between persons under seventeen and persons seventeen and over. The asserted purposes are (1) to protect minors from gambling, the sale of narcotics, and other unlawful activities (J.A. 18-19, 80; Appnt's Br. 5, 13); (2) to discourage truancy (J.A. 19; Appnt's Br. 5, 13); (3) to prevent minors from imprudently spending their lunch money (J.A. 18-19); and (4) to contribute generally to the health, welfare, and morals of the inhabitants of Mesquite (J.A. 80-81; Appnt's Br. 17-22).

1.

This Court need not blindly accept assertions of legislative purpose when the history of the legislation affirmatively demonstrates a different goal. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975); *Jimenez* v. *Weinberger*, 417 U.S. 628, 634 (1974). *See also Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 267-68 (1977). Notwithstanding Mesquite's present asserted justifications for Ordinance No. 1353, the history of the ordinance and the city's own admission shows that the purpose was to prevent Aladdin's from continuing business in the city because of a purported criminal relationship "ferreted out" by a police investigation. See pp. 6-7, *supra*. The state court already had found, in a proceeding to which Mesquite was a party and in which it had a full opportunity to offer evidence and be heard, that there was no evidence of such a relationship. (J.A. 105.) The actual reason for passage of the ordinance was thus unreasonable, unfair, and arbitrary.

Under these circumstances, the ordinance, contrary to the city's argument (Appnt's Br. 12-16), is not entitled to the judicial deference traditionally accorded legislative acts. *Village of Arlington Heights*, 429 U.S. at 265-66. Deference should be accorded only absent "invidious discrimination" or "some reason to infer antipathy." *Parham* v. *Hughes*, 441 U.S. 347, 351 (1979); *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). Here the City Council's action is, in its purpose and effect, a bill of attainder against Aladdin's. *Cf. Nixon* v. *Administrator of GSA*, 433 U.S. 425, 472 (1977); *United States* v. *Brown*, 381 U.S. 437, 447 (1965). Legislative action that is unconstitutionally motivated should be held invalid. *Epperson* v. *Arkansas*, 393 U.S. 97, 107-09 (1968); *Griffin* v. *County School Board*, 377 U.S. 218, 231 (1964). *See also* Brest, *Palmer* v. *Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 116-18.

2.

Even if invidious discrimination were absent, the classifications made by the ordinance are irrational and arbitrary, and fail to advance the city's purported goals.

We recognize at the outset that *Murphy* v. *California*, 225 U.S. 623 (1912), upheld a municipal ordinance prohibiting commercial billiard halls against substantive due process and equal protection challenges.[12] In rejecting the substantive due process argument, the Court appeared to take judicial notice that "idleness and other evils" were nurtured by billiard halls. The equal protection rulings were that a commercial billiard hall operator was not denied equal protection by reason of the ordinance's exemption of billiard rooms maintained for use of guests by hotels having 25 rooms or more, and that the operator lacked standing to complain of the classification between larger and smaller hotels.

Although *Murphy* can be distinguished on the ground that the equal protection issues raised there were different from those presented here, sentiments expressed by the Court in deciding the due process issue support the moralistic rationale advanced in Mesquite's brief. Since 1912, however, much has changed, including the Court's view on the moral quality of idleness and on the constitutional protections to which private, lawful conduct is entitled. *See, e.g., Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 163-64, 165-71 (1972). The philosophical underpinnings of

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[12] The strict scrutiny standard had, of course, not been developed in 1912 and was not applied in *Murphy*, so that decision does not affect the challenges to the age restriction based on the fundamental rights of expression and association. See pp. 29-39, *infra*.

a 1912 substantive due process ruling should not govern an equal protection decision by today's Court.

Two rational basis decisions of the last decade in which the Court invalidated statutes are pertinent here. *United States Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973), held that a classification that denied food stamp eligibility to households whose members were not "all related to one another" did not bear a rational relationship to, *inter alia*, "the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program." *Id.* at 535-38. *Jiminez* v. *Weinberger*, 417 U.S. 628 (1974), held that a classification determining dependency and hence entitlement under the Social Security Act for disability insurance benefits between two classes of illegitimates born after the parent's disability was not reasonably related to the asserted governmental purpose of preventing spurious claims. *Id.* at 635-37. In both of these cases, the Court was willing to consider whether the classification had any realistic relationship to the legislative purpose. If *Moreno* and *Jiminez* are still viable, the same question should be asked and answered here.

The age restriction improperly draws a distinction between owners and operators of coin-operated games and all other proprietors of amusements. *Cf. Jiminez* v. *Weinberger*, 417 U.S. at 637. There is no rational basis for concluding that gambling,[13] narcotics sales, truancy, or spending of lunch money occur in connection with the

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[13] The amusement games owned and operated by Aladdin's are not gambling devices under Texas law. *See* TEX. PENAL CODE ANN. tit. 4, §§ 47.01-47-07 (Vernon 1974), which defines gambling, and TEX. PENAL CODE ANN. tit. 4, § 47.01, at 296 (Note by Searcy & Patterson), which indicates that the definition of gambling intended to "exclude amusement-type pinball machines" and similar devices from the prohibition of Texas law. Mesquite's argument is apparently that the games provide an opportunity to make

(footnote continued)

playing of coin-operated games more frequently than with other commercial games and amusements, such as bowling alleys, miniature golf establishments, and carnivals. These commercial amusements share the same clientele, are readily accessible to youths under seventeen, and are within their typical budget. The owners and operators of these other games and devices, which are not subject to the age restriction, are situated identically, so far as the purported purposes of the age restriction are concerned, to owners of coin-operated games. *See, e.g., City of Ferndale* v. *Palazzolo*, 62 Mich. App. 140, 146-47, 233 N.W.2d 216, 220 (1975) (ordinance that prohibited operation of pinball machines but did not apply to bowling alleys violated equal protection clause).

Also, the age restriction improperly fails to distinguish between coin-operated game locations that, like Aladdin's, are clean, safe, and lawfully and responsibly operated, and those that are not. This failure to distinguish between types of establishments also is an improper classification that invalidates the restriction.[14]

(footnote continued)

"side bets." Of course, any game where a score is kept would do the same thing, but, more important, only playing is inhibited by the ordinance and non-players are as able to make side bets as players. Mesquite has admitted, in any event, that it is unaware of any gambling ever having occurred. (J.A. 66.)

[14] No doubt it is easier for Mesquite to assume that all coin-operated amusement centers will give rise to the ills the restriction purports to address than it would be for the city to determine this question on a case-by-case basis. Referring to the classification as an improper conclusive presumption, which also can be said of the classification at bar identified in the text, this Court said in *Vlandis* v. *Kline*, 412 U.S. 441, 451 (1973), "The State's interest in administrative ease and certainty cannot, in and of itself, save the conclusive presumption from invalidity." Moreover, administrative ease and certainty are not even relevant considerations in this case, where conducting case-by-case inquiries of the two coin-operated

(footnote continued)

Moreover, the distinction between youths under seventeen and those seventeen and over is irrational because the restriction on the former class fails, as Mesquite all but admits, to further the purported legislative purposes. *See United States Department of Agriculture* v. *Moreno*, 413 U.S. at 537. As the city acknowledged in its jurisdictional statement at 3, the ordinance allows children of any age to frequent coin-operated game centers. Although a child under seventeen may not play a game even if he is accompanied by a grandparent, or by a parent of a friend, he may, without parent, legal guardian, or supervision of any kind, be present when the game is being played by another. Thus, the ordinance does not protect children from coming into contact with whatever occurs at coin-operated game locations or even from paying for another to play a game. The only thing they cannot do is to play the coin-operated games, an activity which, in itself, is not the evil sought to be remedied. The restriction itself does not, therefore, achieve its purported purposes directly. It does so, if at all, only by discouraging persons under seventeen from congregating through removing an incentive to do so, and thus impermissibly interfering with the First Amendment right of association. See pp. 34-36, *infra*.

Furthermore, as to the asserted truancy justification, the age restriction not only allows children to frequent coin-operated game centers during school hours so long as they do not play the games, but is also irrationally overinclusive: it prohibits them from playing the games during hours when school is not in session, when it can have no

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(footnote continued)
amusement centers in Mesquite certainly would not tax unduly the city's resources. Hence, this case is unlike *Weinberger* v. *Salfi*, 422 U.S. 749, 777 (1975), where the "expense and other difficulties of individual determinations justified the inherent imprecision of a prophylactic rule."

relationship whatsoever to truancy. The restriction is not reasonably limited, as it could easily be, to school hours. Aladdin's' Mesquite center does not permit school children to play the games during school hours. (J.A. 152; S.A. 2.)

Mesquite's final justification for the age restriction, that it contributes generally to the health, welfare, and morals of its citizens, represents nothing more than a value judgment about the relative benefit of coin-operated amusement games in Mesquite. The provision clearly has nothing to do with health, and we are not aware of any case in which this Court has upheld a classification on the sole ground that it somehow contributes to general welfare and morals in some subjective, unarticulated way.[15]

In summary, the age restriction makes arbitrary classifications bearing no rational relationship to the ordinance's purported purposes. Several state courts that have addressed restrictions on coin-operated games have correctly held that they violate the equal protection clause of the Fourteenth Amendment. *Cossack* v. *City of Los Angeles*, 11 Cal. 3d 726, 734, 523 P.2d 260, 265, 114 Cal. Rptr. 460, 465 (1974); *State* v. *Bloss*, 613 P.2d 354, 358-61 (Hawaii 1980); *City of Ferndale* v. *Palazzolo*, 62 Mich. App. 140, 146-47, 233 N.W.2d 216, 220 (1975). This Court should reach the same result.

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[15] *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974) (Appnt's Br. 18, 22), is not such a case. There the Court upheld a zoning ordinance limiting land use to one-family dwellings, and defining the word family to preclude occupancy by more than two unrelated persons. While the Court referred to general considerations of "family values" and "youth values," it specifically observed that the zoning restriction was rationally designed to alleviate concrete "urban problems" of lack of space, traffic congestion, and excessive noise. 416 U.S. at 9. *Belle Terre* cannot stand for the proposition that "the desire to protect moral values" (Appnt's Br. 19) cures the constitutional defect in an arbitrary and irrational legislative classification.

B. Ordinance No. 1353 Abridges The Fundamental Rights Of Expression And Association, And Cannot Be Justified Under The Strict Scrutiny Test.

The ordinance also abridges fundamental personal rights of expression and association, and cannot survive the strict scrutiny by which such a regulation must be tested.[16]

The city complains that the strict scrutiny question was considered for the first time in the Court of Appeals, although it does not argue that this alone warrants reversal. (Appnt's Br. 6, 11.) The Court of Appeals clearly had power to reverse on grounds not considered by the District Court. *Hormel* v. *Helvering*, 312 U.S. 552 (1941). The exercise of that power is "left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976). When important Fourteenth and First Amendment interests are implicated, as they are here, a Court of Appeals may properly exercise its discretion to consider the issue. *See, e.g., Staton* v. *Mayes*, 552 F.2d 908, 915 (10th Cir.), *cert. denied*, 434 U.S. 907 (1977); *Founding Church of Scientology* v. *United States*, 409 F.2d 1146, 1164 n.2 (D.C. Cir.) (per curiam), *cert. denied*, 396 U.S. 963 (1969).

Mesquite has not shown that, because the strict scrutiny issue was not before the District Court, prejudice occurred. The record is plainly adequate for a determination of whether the First Amendment rights asserted here exist. The only reason for remanding would be to take additional evidence on whether there is a compelling state in-

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[16] The right of Aladdin's to assert the rights of third persons who are affected by the ordinance is not put in issue by Mesquite in its Appellant's Brief and is beyond challenge. *Carey* v. *Population Services International*, 431 U.S. 678, 683-84 (1977); *Craig* v. *Boren*, 429 U.S. 190, 192-97 (1976); *Gooding* v. *Wilson*, 405 U.S. 518, 520-21 (1972); *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-87 (1965).

terest justifying the restriction. Although Mesquite implies that it would have offered additional evidence, presumably on the latter issue, it does not indicate what that evidence would have been, and it is fair to assume that it would have been merely cumulative. The city's conditional request for a remand on that issue should be denied.

1. The Right of Expression.

The First Amendment's broad protection of free speech guarantees an individual's right of self-expression and right to receive others' expressions and ideas. *See, e.g., First National Bank* v. *Bellotti*, 435 U.S. 765, 777 n.12 (1978); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-63 (1972). *See* Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U.Ill.L.F. 746, 752-53. Because entertainment is a form of communication and expression, this First Amendment protection extends to it in its many forms. *Schad* v. *Borough of Mt. Ephraim*, 101 S.Ct. 2176, 2181 (1981); *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977). Certainly, when the scope of coverage extends to expressive entertainment on the very periphery of the First Amendment, such as the nude dancing involved in the *Mt. Ephraim* case,[17] coin-operated games are entitled to no less protection.

Coin-operated games, as a legal and creative form of entertainment and expression, are not constitutionally distinguishable from other similarly legitimate means of entertainment. Video games, which represent about two-

[17] Even coin-operated video or motion picture "peep shows" have been held entitled to constitutional protection. *People* v. *Glaze*, 27 Cal. 3d 841, 614 P.2d 291, 166 Cal. Rptr. 859 (1980). *See also 414 Theatre Corp.* v. *Murphy*, 360 F. Supp. 34 (S.D.N.Y. 1973), *aff'd*, 499 F.2d 1155 (2d Cir. 1974).

thirds of the market today,[18] each contain a cathode ray tube upon which a series of related images are projected by means of electronic equipment. *Midway Manufacturing Co.* v. *Drikschneider*, Civ. No. 81-0-243, Slip. Op. at 3, 13 (D. Neb. July 15, 1981). The subject matter of the game is fixed in a computer program stored in a memory device that, with the aid of electronic circuitry, can continually reproduce the visual display. *Stern Electronics, Inc.* v. *Kaufman*, Civ. No. CV-80-3248, Slip Op. at 6 (E.D.N.Y. May 22, 1981). Once a coin is deposited and the game begins, the player or players are able to control some of the images on the screen, and the others move in a predetermined sequence and interact with the player-controlled images. *Midway Manufacturing Co.*, Slip Op. at 4. Success in the games requires a high degree of skill and depends on "eye-hand coordination, reflexes, muscular control and above all, concentration." *WNEK Vending & Amusements Co.* v. *City of Buffalo*, 107 Misc. 2d 353, 434 N.Y.S.2d 608, 612 (Sup.Ct. 1980). Modern day pinball games likewise require skill and have been said to be "indistinguishable from other skill-related amusement games which minors are allowed to play." *State* v. *Bloss*, 613 P.2d 354, 361 (Hawaii 1980). The rights to enjoy these games and to author and distribute them should be entitled to a broad measure of constitutional protection.

Coin-operated games, and particularly the electronic video games that are the principal subject of the case at bar, embody in a tangible form the author's expression of a particular idea or fantasy. Design of a successful game requires an author to convey his theme or idea through a combination of audio and visual effects to produce an attractive and stimulating contest of skill. Develop-

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[18] *Arcade Operators Survey, Part II, Play Meter* at 21 (June 1, 1981).

ment of a new game takes a manufacturer from eight months to a year and requires a substantial investment. *Stern Electronics, Inc.*, Slip Op. at 5. Games sell for as much as $5,000 each. (J.A. 32.) The creativity and originality necessary to produce a successful video game has convinced the courts to provide these games with the protection of the copyright laws.[19] Restricting access of others to the games is an interference with the First Amendment right of expression of the author, and the First Amendment right of the manufacturer and seller and of Aladdin's to publish the author's expression.

The restriction here is also an interference with minors' First Amendment rights. One of these rights is to benefit from exposure to the creative expression the games convey. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 389-90 (1969); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969). Another is to enjoy, as a participant in the game, the self-expression for which the game provides an effective medium. A video game is "a movie in which the viewer participates in the action." *Stern Electronics, Inc.* v. *Kaufman*, Slip Op. at 8. The player matches his wits and reflexes against those programmed into the game. Mastery of these games requires the development of skill and the exercise of "a high degree of concentration." (Appnt's Br. 26.) *See Cossack* v. *City of Los Angeles*, 11 Cal. 3d 726, 523 P.2d 260, 114 Cal. Rptr. 460 (1974); *WNEK Vending & Amusements Co.* v. *City of Buffalo*, 107 Misc. 2d 353, 434 N.Y.S.2d 608 (1980).

In the premium the games place on skill and concentration, they are "fundamentally" the same as athletic or semi-athletic games such as archery, quoits, horseshoes, and shuffleboard, *see, e.g., Cossack* v. *City of Los Angeles*,

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[19] *See, e.g., Stern Elec. Inc.* v. *Kaufman*, No. CV-80-3248 (E.D. N.Y. May 22, 1980); *Midway Mfg. Co.* v. *Dirkschneider*, No. 81-0-243 (D. Neb. July 15, 1981); *Cinematronics, Inc.* v. *Shapiro*, No. Civ. 81-328 (D. Ariz. April 17, 1981). Copies of the slip opinions referred to have been lodged with the Court.

11 Cal. 3d at 735, 523 P.2d at 266, 114 Cal. Rptr. at 466, and non-athletic games such as bridge. In games, as in artistic pursuits such as painting or ballet, the participant derives pleasure and satisfaction commensurate with his skill and talent. These activities, although non-verbal, are means of individual expression. As Marshall McLuhan observed:

> Games as popular art forms offer to all an immediate means of participation in the full life of a society, such as no single role or job can offer to any man.
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> • • •
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> That games are extensions, not of our private but of our social selves, and that they are media of communication, should now be plain.

M. McLuhan, Understanding Media 210, 216 (1964).

As games of skill, coin-operated amusement games are also vehicles for competition, which is another kind of self-expression for the participants. Whether the competition occurs informally at an amusement center or as part of an organized contest,[20] it provides a player with an opportunity to express his individuality by competing and to communicate with others of similar interests.

Mesquite attempts to denigrate the rights associated with coin-operated games as inconsequential and frivolous. This Court long ago, however, rejected the notion that the level of protection given any expression turns on its importance or social utility. *Cohen* v. *California*, 403 U.S. 15, 24-26 (1971); *NAACP* v. *Button*, 371 U.S. 415, 444-45 (1963). The protection given a constitutionally protected right does not vary with the value judgments made by legislative bodies as to the significance of the right.

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[20] A recent competition in New York on a video game sponsored by the game's distributor attracted over 4,000 entrants. See *WNEK Vending ! Amusements Co.* v. *City of Buffalo*, 107 Misc. 2d 353, 434 N.Y.S.2d 608, 617 (1980).

2. The Right of Association.

The record in this case leaves no doubt that the age restriction, if it was adopted for the reasons the city professes and not solely because of antipathy toward Aladdin's, see p. 23, *supra*, is designed to prevent, in the words of the ordinance's preamble, "congregation of youthful patrons." (J.A. 80.) This is accomplished not by a direct prohibition against congregating, but by prohibiting youths from playing the games unless accompanied by a parent or guardian and thereby discouraging them from coming to the game center. The playing of the games, which is the activity prohibited by the restriction, is not in itself claimed to give rise to the problems the ordinance is allegedly aimed at alleviating. The games are simply the reason for the congregating that the ordinance seeks to prevent.

That the city council did not consider the act of playing coin-operated amusement games itself detrimental to youth is clear from the ordinance. In addition to permitting minors to play the games at amusement centers when accompanied by a parent or guardian, the ordinance exempts coin-operated amusement games operated by local, state, or federal governmental entities, or by charitable organizations. (J.A. 84.)[21] None of the city's witnesses at trial suggested that youths were harmed by the act of playing coin-operated games. Their testimony sought to establish the need to eliminate a meeting place for youths in an effort to stem disorderly conduct and truancy, the root causes of which they acknowledged were unrelated to coin-operated amusement centers (J.A. 134-41), and to protect children from exposure to an "unwholesome" atmosphere, which they could not say existed at Aladdin's Castle. (J.A. 146-

[21] Although these references are to Mesquite Ordinance No. 1353, the analysis is equally applicable to Ordinance No. 1410, which reincorporates the identical provisions and legislative findings.

48.) The city seeks to deal with these problems by discouraging "congregation of youthful patrons." Unless the ordinance achieves that, it serves no purpose whatsoever. See p. 27, *supra*.

The Mesquite ordinance is thus designed to interfere with the First Amendment right of association. This Court has made it plain that a regulation neutral on its face is subject to constitutional challenge if adopted for an impermissible purpose. *Washington* v. *Davis*, 426 U.S. 229, 241 (1976). Nor must an aggrieved party prove that the impermissible purpose was the sole motivation for the legislative act. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265-66 (1977). *Arlington Heights* permits a plaintiff to pierce the facial validity of a legislative act and, using evidence such as the sequence of events leading up to the challenged legislative act, legislative history, and the testimony of officials, to prove that one of the purposes of the act is impermissible. *Id.* at 267-68. In the case at bar, the preamble of the ordinance, its structure as a whole, and the testimony elicited in the District Court make it clear that the Mesquite ordinance was aimed at discouraging associational conduct.

Although, as the Court of Appeals observed, this Court has not expressly decided the point, it has assumed that a right of social association exists. *See Gilmore* v. *City of Montgomery*, 417 U.S. 556, 575 (1974); *Coates* v. *City of Cincinnati*, 402 U.S. 611, 615-16 (1971). Association for social purposes should be entitled to the same protection as association for political or other purposes. The language of the First Amendment does not restrict the purposes to which the right applies. The right of expression extends to entertainment contexts and there is no reason the right of social association should not have the same scope.

Speaking of associational rights, this Court has said, " 'Freedoms such as these are protected not only against

heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'" *Healy* v. *James*, 408 U.S. 169, 183 (1972), *quoting Bates* v. *City of Little Rock*, 361 U.S. 516, 523 (1960). In *Healy*, officials of a state college denied official school recognition to the local chapter of Students for a Democratic Society (SDS) because the published aims of the national SDS chapter included disruption and violence. The school contended that, although nonrecognition prevented the group from using various campus facilities, it did not abridge the group's associational rights. This Court disagreed, holding that the disabilities imposed constituted an impermissible infringement of these rights. *See also Familias Unidas* v. *Briscoe*, 619 F.2d 391 (5th Cir. 1980) (statute empowering judge to exact disclosure of membership lists of groups interfering with school operations violates right of association); *Gay Students Organization* v. *Bonner*, 509 F.2d 652 (1st Cir. 1974) (prohibiting organization from holding social activities on campus held to deny members of the organization their associational rights).

Mesquite may, of course, seek to eliminate the problems of truancy and exposure of youth to illegal activities by attacking those problems directly.[22] It may not, however, inhibit the lawful gathering of citizens on the theory that the gathering may lead to unlawful conduct. *See, e.g., Sawyer* v. *Sandstrom*, 615 F.2d 311, 318 (5th Cir. 1980).

3. Regulation of Minors

Mesquite argues that despite its broad restriction on First Amendment rights, the ordinance is constitutional simply because the rights abridged are those of minors

[22] For example, in combating truancy, the city could simply prohibit minors from playing the games during school hours. The city could minimize corrupting influences at amusement centers by requiring the presence of an adult attendant at all times.

and, thus, entitled to a lesser degree of protection. (Appnt's Br. 23-25.) In so arguing, Mesquite ignores not only the rights of the games' creators, discussed above, but also the well-established principle that minors "are possessed of fundamental rights which the State must respect." *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 511 (1969). *Accord, Planned Parenthood* v. *Danforth*, 428 U.S. 52, 74 (1976). "A child, merely on account of his minority, is not beyond the protection of the Constitution." *Bellotti* v. *Baird*, 443 U.S. 622, 633 (1979) (plurality opinion by Powell, J.).

To be sure, in certain limited circumstances "the state may have greater power to regulate conduct that is otherwise constitutionally protected if the regulation applies only to children," as the Court of Appeals recognized. 630 F.2d at 1042. This limited right to restrain minors in a way that would be unconstitutional if applied to adults stems from

> the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.

Bellotti v. *Baird*, 443 U.S. at 634. The special circumstance of youth, however, cannot be invoked to justify all restrictions on minors' constitutional rights. *See, e.g., Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976); *Goss* v. *Lopez*, 419 U.S. 565 (1975). This Court has been especially reluctant to permit the infringement of minors' rights in the area of First Amendment freedoms. *See Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943). Thus, although a different standard of obscenity is appropriate for minors, *Ginsberg* v. *New York*, 390 U.S. 629, 638 (1968), "[s]peech that is

neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 213-14 (1975). The First Amendment right of freedom of association for a lawful purpose is entitled to similar protection.

In this case, none of the conditions precedent for applying the lesser measure of constitutional protection obtain. Neither the playing of amusement games nor the congregation of minors at amusement centers present dangers unique to minors. Neither playing coin-operated games nor congregating with one's peers involves minors in the making of a critical decision requiring state guidance. Minors who can decide to participate in political debate, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), and to obtain an abortion, *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976), can certainly decide without state input whether to visit these centers or to spend a quarter on a game.

Finally, the ordinance cannot be justified as an attempt to assist parents in the upbringing of their children. The ordinance, in fact, has the opposite effect by burdening parents and usurping their primary role in child-rearing. *See Wisconsin* v. *Yoder*, 406 U.S. 205 (1972). Unlike parents in New York who could avoid the restriction on sales to minors by themselves simply buying the magazines for their children, *Ginsberg* v. *New York*, 390 U.S. at 639, parents who decide to permit their children to enter and play at these amusement centers now must accompany their children on each visit. If a parent has no objection to the child visiting the centers and playing the games unescorted, the state has no right to overrule that decision.

4. Strict Scrutiny.

The unjustified abridgment of First Amendment rights is an independent ground for holding the ordinance invalid without reference to an equal protection analysis. In addition, that abridgment makes the strict scrutiny test for equal protection applicable. Under that test, the classification based on age can stand only if it serves a compelling state interest and is no more restrictive than is necessary to protect that interest. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 269 (1974). The discussion at pp. 24-28, *supra*, of the interests purportedly served demonstrates that the ordinance cannot meet the strict scrutiny test.

III.

ORDINANCE NO. 1353's "CONNECTIONS WITH CRIMINAL ELEMENTS" LICENSING STANDARD IS VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

A. The Passage Of Ordinance No. 1410 Does Not Render This Appeal Moot, As The City's Action Is Merely A Voluntary Cessation Of The Impermissible Conduct.

While the appeal was pending in the Court of Appeals, Mesquite repealed the ordinance in issue in this case, and enacted in its stead an ordinance continuing the age restriction but not containing the reference to "connections with criminal elements" and its accompanying definition. Inasmuch as the law at the time of appeal generally controls, *United States* v. *Alabama*, 362 U.S. 602, 604 (1960) (per curiam), this action by Mesquite raises the question of whether the case now is moot with respect to the vagueness issue.[23] As mootness is a jurisdictional question that the

[23] Even if the Court were to find the vagueness issue moot, this would not affect the Court's jurisdiction over the age restriction claim, *Powell* v. *McCormack*, 395 U.S. 486, 497 (1969), although for the reasons stated at pp. 10-14, *supra*, the appeal should be dismissed and certiorari denied as to that claim.

Court must consider, *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (per curiam), Aladdin's brings this matter to the Court's attention. We suggest, however, that the vagueness issue is not moot.

Mootness results when events occur during pendency of the appeal that make it impossible for a reviewing court to render a judgment affecting the rights of the litigants. *DeFunis* v. *Odegaard*, 416 U.S. 312, 316 (1974) (per curiam). When the supervening event is a voluntary cessation of challenged conduct, the test for mootness is stringent, for without the compulsion provided by a binding judgment "[t]he defendant is free to return to his old ways" and thus avoid an adjudication of the legality of his conduct. *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also United States* v. *Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). In such cases, mootness will be found only if "it can be said with assurance" that (1) there is no reasonable expectation of the violation recurring, and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles* v. *Davis*, 440 U.S. 625, 631 (1979). In this case, neither criterion is satisfied.[24]

First, there is "a reasonable expectation" of recurring violation. Significantly, Mesquite modified its ordinance only after the adverse District Court ruling. In the *W.T. Grant* case, the Court noted the special need "to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandon-

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[24] Mesquite's formal amendment of its ordinance clearly constitutes voluntary cessation, and is entitled to no greater consideration than is informal voluntary cessation undertaken by private parties. *Compare Concentrated Phosphate Export Ass'n*, 393 U.S. at 203 (amendment of government regulations) *with W.T. Grant Co.*, 345 U.S. at 630-31 (elimination of interlocking directorates).

ment seems timed to anticipate suit." 345 U.S. at 632-33 n.5. On the other hand, the Court in *County of Los Angeles* found there was "no reason to believe that petitioners would replace their present hiring procedure with procedures that they regarded as unsatisfactory [and abandoned] even before the commencement of this litigation." 440 U.S. at 632-33.

It is also significant that the city has vigorously asserted the validity of the "criminal elements" provision both in the Court of Appeals and in this Court. In *Walling* v. *Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944), the Court declined to treat as moot an action under the Fair Labor Standards Act even after the defendant employer had changed its pay method voluntarily, observing that "[r]espondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made." *See also National State Bank* v. *Long*, 630 F.2d 981, 983-984 n.2 (3d Cir. 1980).

Mesquite's attachment to the phrase "connections with criminal elements" has persisted since 1973, when Ordinance No. 1103 was adopted. Even after a state court held that phrase impermissibly vague, Mesquite attempted to save the phrase by adding a definition thereof to the ordinance. The deletion of the phrase and its definition after an adverse judgment and pending appeal hardly suggests a change of heart. It cannot be said with assurance that there is no reasonable expectation that the provision will reappear in a future ordinance if this case is held moot.[25]

[25] Even were Mesquite to proclaim its unequivocal abandonment of the phrase "connections with criminal elements," such a pronouncement would not suffice to render the case moot. At most, this pronouncement would be entitled to consideration in determining the continuing need for an injunction against the discontinued act. *United States* v. *W.T. Grant Co.*, 345 U.S. at 633.

As for the second condition of mootness stated in *County of Los Angeles*, 440 U.S. at 631, Mesquite's substitution of the new ordinance has not "completely and irrevocably eradicated the effects of the alleged violation." In the past the vagueness of the phrase "connections with criminal elements," aggravated by Mesquite's unwarranted animosity toward Aladdin's, resulted in denial of a license to Aladdin's until a court intervened. There are indications that the new ordinance, No. 1410 (see App.), is intended to incorporate *sub silentio* the impermissibly vague standards of the old. Thus the code words "criminal elements" appear in the statement of purpose. (Section 10.) The complex and burdensome disclosure requirements for applicants (arrests, fingerprints, past licensing history, etc., sections 6(5)(f), (g), (h)), the results of which are to be the basis for the chief of police's annual determination of suitability for licensing, appear calculated to perpetuate the vague standard of the former ordinance.

Accordingly, this case satisfies neither of the requisites of mootness. There exists a reasonable likelihood that Mesquite will reenact the objectionable provision if it is permitted to avoid the binding effect of the judgments below; and there remain lingering effects of the phrase "connections with criminal elements" in the new ordinance. The Court should therefore reach the merits of the vagueness claim.

B. The Phrase "Connections With Criminal Elements," Even With Its Accompanying Definition, Is So Imprecise And Capable Of Varying Interpretation As To Be Void For Vagueness.

Due process prohibits laws so vague that persons "of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Smith* v.

Goguen, 415 U.S. 566, 572 n.8 (1974). Vague laws—be they civil or criminal, *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 239 (1925)—offend due process in three related ways: they fail to afford persons "a reasonable opportunity to know what is prohibited, so that [they] may act accordingly"; they fail to provide "explicit standards for those who apply them," and thus invite arbitrary and discriminatory enforcement; and they operate "to inhibit the exercise of . . . protected freedoms . . . [by] inevitably lead[ing] citizens to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). All three consequences flow from the Mesquite ordinance directive that the chief of police consider an applicant's "connections with criminal elements" in evaluating license applications.

Mesquite does not contend that the phrase "connections with criminal elements," standing alone, can withstand a due process[26] challenge. Mesquite's contention is that the definition of "connections with criminal elements" contained in the ordinance[27] imbues this phrase with sufficient clarity to satisfy the requirements of due process. This

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[26] Nor could Mesquite so contend in view of the final judgment of the state court adjudicating that issue. *City of Mesquite v. Aladdin's Castle, Inc.*, 559 S.W.2d 92, 94 (Tex. Civ. App. 1977), *aff'd on other grounds*, 570 S.W.2d 377, 378 (Tex. 1978).

[27] That definition reads as follows (J.A. 84-85):

> *Connection With Criminal Elements* is defined as that state of affairs wherein an applicant, or an officer of, principal stockholder of, person having a substantial interest in or management responsibility for, a corporation or other organization wherein such organization is the applicant, directly or as a parent, subsidiary or affiliate, has such association, acquaint-

(footnote continued)

definition, however, rather than clarifying "connections with criminal elements," serves only to underscore its impermissible vagueness.[28]

To begin with, the definition's reference to involvement in "unlawful activities, whether convicted or not," is impermissibly vague. The definition nowhere specifies what, other than a conviction, is sufficient to establish the existence of unlawful activities or involvement therein.

Moreover, the ordinance is silent as to what types of "association, acquaintance, or business association" are sufficient to brand an applicant as being connected with "criminal elements." An applicant cannot determine in advance what kinds of relationships are covered by the ordinance.

(footnote continued)

> ance, or business association with parties having been convicted of a felony or crime involving moral turpitude or are otherwise involved in unlawful activities, whether convicted or not, to the extent that the fencing of stolen merchandise or illegally obtained funds, the procurring [sic] of prostitutes, the transfer or sale of narcotics or illegal substances is made more feasible or likely or the protection of those of tender years from such unwholesome influences are rendered more difficult.
>
> A determination by the United States Department of Justice that a party is a member of the 'mafia' or 'Cosa Nostra' family or that such party is engaged in or affiliated with a nationwide crime organization, whether formally or informally, shall be prima facie evidence, so far as the issuance of a license hereunder that such person has 'connections with criminal elements' and constitute, within the meaning of this ordinance, "criminal elements."

[28] Contrary to Mesquite's assertion (Appnt's Br. 32) that the ordinance definition did not provide a "basis of the court below's decision," both the District Court and the Court of Appeals considered this definition and still found the ordinance unduly vague. 434 F. Supp at 475-76; 630 F. 2d at 1037-1038.

This Court has held that legislatures may not impute to individuals the illegal purposes held by those with whom they associate; rather, there must be inquiry into whether the individuals know of these illegal purposes and share a specific intent to promote them. *Cole* v. *Richardson*, 405 U.S. 676, 680 (1972); *Elfbrandt* v. *Russell*, 384 U.S. 11, 17 (1966). To do otherwise would threaten "the cherished freedom of association protected by the First Amendment." *Id.* at 18. Under this ordinance, however, there is no assurance that Mesquite may not deny licenses on the impermissible basis of guilt by association.

The definition compounds its vagueness by providing that a connection with criminal elements is established "to the extent" that the ill-defined associational relationships, described above, render certain crimes "more feasible or likely," or the protection of youth from unsavory influences "more difficult." There is no ascertainable standard by which to measure when the commission of designated crimes is "more likely or feasible" or the protection of youth "more difficult." These phrases are devoid of any objective criteria that would ensure their uniform application.[29] The ordinance confers upon Mesquite officials the

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[29] For this reason, the instant case is distinguishable from *Grayned* v. *City of Rockford*, 408 U.S. at 108, wherein the Court upheld against a vagueness challenge an ordinance prohibiting the "making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof." The Court noted that it was "apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted," which is "easily measured by [the] impact on the normal activities of the school." *Id.* at 112. Mesquite's ordinance provides no similar discernible objective guidance. Moreover, in *Grayned* the vagueness that otherwise would have inhered in the phrase "tend to disturb" was eliminated by a state supreme court interpretation. *Id.* at 111-12. There is no similar saving state interpretation of the Mesquite ordinance.

discretion to define these terms differently from case to case, and thus denies applicants the ability to order their conduct so as to qualify for licensing.

The final vice of the definition lies in the weight it accords to Justice Department determinations that a party is involved in organized crime. It is unclear whether the words "formally or informally" modify "affiliated with a nationwide crime organization" or "determination by the United States Department of Justice." In either event, the modifier compounds the vagueness of the modified phrase. *Cf. Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939) (defining "gangster" in part as one who is "known to be a member of any gang" held impermissibly vague).

Mesquite urges several arguments in support of the ordinance. It begins by attacking the standing of Aladdin's to challenge this portion of the ordinance. (Appnt's Br. 32-35.) Mesquite argues that since Aladdin's was not seeking a license at the time suit was filed, there was and is no case or controversy. As the Court of Appeals correctly observed, however, the ordinance requires licensees to seek annual renewal of their licenses, and application of the challenged phrase "connections with criminal elements" might prevent Aladdin's from securing a license on renewal, causing it to suffer "substantial pecuniary loss." 630 F.2d at 1036.

Contrary to Mesquite's contention, the state court judgment declaring unconstitutional a prior version of the ordinance that contained the phrase "connections with criminal elements" without definition, *City of Mesquite* v. *Aladdin's Castle, Inc.*, 559 S.W.2d 92, 94 (Tex. Civ. App. 1977), does not preclude Mesquite from enforcing the ordinance here at issue. Significantly, Mesquite never has conceded that it lacks power to enforce Ordinance No. 1353 against Aladdin's.

Mesquite also argues that Aladdin's lacks standing to attack the ordinance provision because, as in *Laird* v. *Tatum*, 408 U.S. 1, 13 (1972), the provision mandates only the collection of information. Here, however, the vaguely defined information that is to be gathered has an effect on licensing decisions. The City Manager and the City Council may base their disapproval upon an adverse recommendation of the chief of police as to the applicant's character, which in turn may be based upon the chief's determination as to "connections with criminal elements." (J.A. 82-83.) The chief of police's recommendation can thus prevent issuance of the license, as it did in this case, or renewal of the license.[30]

Mesquite's contentions on the merits are also without merit. The proposition that post-licensing judicial review is sufficient to correct any vagueness in the ordinance (Appnt's Br. 34) has been soundly rejected by the Court. *Interstate Circuit, Inc.* v. *City of Dallas*, 390 U.S. 676, 685 (1968); *Bouie* v. *City of Columbia*, 378 U.S. 347, 352-53 (1964). Mesquite also asserts that the language is "precise enough so that those charged with the responsibility of review would know what standards to apply." (Appnt's Br. 36.) Due process requires, however, that those who are regulated be able to understand the standard, and that the words be clear to persons "of common intelligence." *Smith* v. *Goguen*, 415 U.S. at 572 n.8.

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[30] It is specious to argue, as does Mesquite, that "connections with criminal elements" cannot be determinative in the licensing process merely because the ultimate inquiry is into an applicant's good character. Section 6 of the ordinance states that in making his determination of an applicant's good character, the chief of police "shall consider . . . connections with criminal elements." (J.A. 82.) Therefore, good character may be determined solely by reference to "connections with criminal elements." Indeed, it is clear from the record in this case that Mesquite's licensing decision was based solely on perceived "connections with criminal elements." (J.A. 32-33.)

Accordingly, the phrase in Mesquite Ordinance No. 1353 "connections with criminal elements" and the definition of that phrase in the ordinance are impermissibly vague, as the Court of Appeals and the District Court correctly held.

C. Even If The Court Deems The Vagueness Issue Moot, The Judgment Should Be Left Intact As To That Issue.

This Court's usual procedure when a case is held moot is to vacate the judgment below and to remand the case to the district court with instructions to dismiss. *Board of Regents* v. *New Left Education Project*, 414 U.S. 807, 807 (1973); *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 and n.2 (1950). When this occurs, the lower court decisions are stripped of their precedential effect, *County of Los Angeles*, 440 U.S. at 634 n.6, "clear[ing] the path for future relitigation of the issues between the parties and eliminat[ing] a judgment, review of which was prevented through happenstance." *Munsingwear*, 340 U.S. at 40.

Although this course of action is required of the intermediate courts of appeals, *Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92, 93-94 (1979), the same does not hold true for this Court, as the *Munsingwear* case recognized by allowing the judgment of the lower court to stand. As stated in *Munsingwear*, the reason for eliminating the precedential effect of moot cases is to allow relitigation of the issues where review was prevented by "happenstance." If this case is moot, review is prevented, not by happenstance, but by planned, deliberate actions of Mesquite in adopting a new ordinance while appealing the decision invalidating the old. If Mesquite simply had elected not to appeal the District Court judgment, that judgment would stand as a binding precedent prohibiting use of the "connections with criminal elements" standard. Mesquite should not be able, by unilateral action, to avoid the effect of the judgment by filing an appeal and then voluntarily taking

action that results in vacating the judgment. Therefore, if this Court rules that the challenge to the phrase "connections with criminal elements" is moot, the District Court judgment should be allowed to stand as to this issue.

CONCLUSION

As to the age restriction claim, this Court should dismiss the appeal and, treating the jurisdictional statement as a petition for certiorari, deny certiorari. If the Court exercises its certiorari jurisdiction to reach the merits, it should affirm on the basis of adequate independent state law grounds supporting the judgment or, if it reaches the federal issues, affirm on the ground that the age restriction is invalid under the First and Fourteenth Amendments.

As to the vagueness claim, the Court should hold the case is not moot and affirm. If it deems the case moot, it should allow the judgment as to this issue to stand.

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Dated: September 1, 1981

APPENDIX

APPENDIX

ORDINANCE NO. 1410

AN ORDINANCE OF THE CITY OF MESQUITE, TEXAS, REPEALING ORDINANCE NUMBER 1353 OF THE CITY OF MESQUITE AND AMENDING CHAPTER 5B, MESQUITE CITY CODE, BY PROVIDING REGULATION OF AND ESTABLISHING A LICENSE FEE FOR COIN-OPERATED AMUSEMENT ESTABLISHMENTS; PROHIBITING THE PLAYING OR OPERATION OF COIN-OPERATED AMUSEMENT MACHINES BY PERSONS UNDER SEVENTEEN (17) YEARS; PROVIDING EXCEPTIONS; PROVIDING FOR REVOCATION OF LICENSE; PROVIDING A RIGHT AND MANNER OF APPEAL; PROVIDING CERTAIN DEFINITIONS; PROVIDING A SEVERABILITY CLAUSE; PROVIDING A PENALTY NOT TO EXCEED TWO HUNDRED DOLLARS ($200.00) FOR EACH OFFENSE; AND DECLARING AN EMERGENCY.

WHEREAS, coin-operated amusement establishments have a tendency to attract patrons of tender years, and

WHEREAS, the congregation of youthful patrons creates problems of policing due to the need to protect such patrons from the influences of those who would promote gambling, sale of narcotics and other unlawful activities; and

WHEREAS, it is vital to the safety and welfare of the inhabitants of the City of Mesquite and particularly those of tender years for whom a special duty is imposed upon the governing body to protect, that proper and suitable operators only are licensed to operate coin-operated amusement establishments and that such establishments be regulated to that end; and

WHEREAS, it has been determined that the attraction of such establishment for those under seventeen (17) years of age is detrimental to such persons and to the health and welfare of the inhabitants of the City, generally.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MESQUITE, TEXAS:

SECTION 1. That Ordinance Number 1353 of the City of Mesquite passed on the 7th day of February, 1977, is hereby repealed.

SECTION 2. That Chapter 5B, Mesquite City Code is hereby amended to read as follows:

SECTION 3. It is hereby declared to be unlawful to own, display or operate coin-operated amusement machines or apparatus in the City without a license issued by the City of Mesquite therefor.

SECTION 4. It is hereby declared to be unlawful to own, operate or maintain a coin-operated amusement establishment in the City without a license issued by the City of Mesquite therefor.

SECTION 5. It shall be unlawful for any owner, operator or displayer of coin-operated amusement machines or coin-operated amusement establishments to allow any person under the age of seventeen (17) years to play or operate a coin-operated amusement machine unless such minor is accompanied by a parent or legal guardian.

SECTION 6. *License*: Any person desiring to obtain a license for a coin-operated amusement machine may apply to the Assessor-Collector of Taxes of the City of Mesquite

on a form to be furnished by the City showing the type of machine to be licensed, serial number, location, name of establishment and name of the owner or person in control of such machine together with the name and title of person making the application if other than the owner.

Upon payment of the license fee, the Assessor-Collector shall issue a license which shall be valid for such machine for one (1) year.

Any person desiring to obtain a license for a coin-operated amusement establishment shall apply to the City Secretary by original and five (5) copies, one of which shall be routed to the City Manager, Chief of Police, Chief Building Inspector and City Planner, for review. The applicant shall accompany the application with a tender of the correct permit fee as hereinafter provided and shall, in addition, furnish the following:

(1) The type of ownership of the business, i.e., whether individual, partnership, corporation, or otherwise;

(2) The name under which the business is to be conducted;

(3) The business address and all telephone numbers where the business is to be conducted;

(4) The name and residence address of the manager or other person principally in charge of the operation of the business;

(5) The following personal information concerning the applicant, if an individual; and concerning each stockholder holding more than ten (10) per cent of the stock of the corporation, each officer and each director, if the applicant is a corporation; and concerning the partners, including limited partners, if

the applicant is a partnership; and the holder of any lien, of any nature, upon the business and/or the equipment used therein; and concerning the manager or other person principally in charge of the operation of the business:

(a) Name, complete residence address and residence telephone numbers,

(b) The two (2) previous addresses immediately prior to the present address of the applicant,

(c) Written proof of age,

(d) Height, weight, color of hair and eyes, and sex,

(e) Two (2) front-face portrait photographs taken within thirty (30) days of the date of the application and at least two (2) by two (2) inches in size.

(f) The coin-operated amusement or similar business history and experience ten (10) years prior to the date of application, including but not limited to whether or not such person in previously operating in this or another city or state under license or permit has had such license or permit denied, revoked, or suspended and the reason therefor, and the business activities or occupations subsequent to such action of denial, suspension or revocation,

(g) All criminal arrests other than misdemeanor traffic violations, fully disclosing the jurisdiction in which arrested and the offense for which arrested and the disposition thereof.

(h) A complete set of fingerprints taken and to be retained on file by the police chief or his authorized representatives;

(6) Such other information, identification, and physical examination of the person as shall be deemed necessary by the police chief to discover the truth of the matters hereinbefore required to be set forth in the application;

(7) Authorization for the city, its agents and employees to seek information and conduct an investigation into the truth of the statements set forth in the application and the qualifications of the applicant for the permit;

(8) The names and addresses of three (3) adult residents of the county who will serve as character of references. These references must be persons other than relatives and business associates.

(9) Written declaration by the applicant, under penalty of perjury, that the foregoing information contained in the application is true and correct, said declaration to be made under oath.

The Chief of Police shall make his recommendation based upon his investigation of the applicant's character and shall consider past operations, if any, convictions of felonies and crimes involving moral turpitude, taking into consideration the attraction by such establishments of those of tender years.

The Chief Building Inspector and City Planner shall determine compliance with applicable building and zoning ordinances of the City.

When the City Manager has received the recommendations from the Chief of Police, Chief Building Inspector and City Planner, he shall review such application together with such recommendations as may be furnished and shall approve such application or disapprove same with written notation of his reasons for disapproval.

Upon approval by the City Manager and payment of the license fee, the City Secretary shall issue a license for such establishment, which shall be valid for one (1) year and shall be non-transferrable.

Upon disapproval, the applicant may make such corrections as noted and request approval, request withdrawal and refund of license fee, or give notice of appeal from the City Manager's decision.

In the event of appeal from the City Manager's decision, the applicant shall give written notice of his intention to appeal within ten (10) days of notice of the City Manager's decision. Such appeal shall be heard by the City Council within thirty (30) days from date of such notice unless a later date is agreed upon by applicant or continuation is necessary to obtain additional information regarding applicant's character.

Upon appeal to the City Council of the City Manager's decision based upon an adverse recommendation by the Chief of Police as to applicant's character, the applicant shall have the same burden as prescribed in Article 305, V.A.C.S. to show to the Council that he or it is of good character as a law abiding citizen to such extent that a license should be issued. In order to discharge such burden, the applicant may be required by the City Council to furnish such information as may be pertinent and relevant to the determination of applicant's character.

The City Attorney is hereby directed to serve notice upon applicant within ten (10) days from date of notice of appeal as to the nature and extent of information to be furnished to the City Council for

purposes of the hearing on appeal. Notice of the information required may be supplemental before, during, and after the hearing before the City Council. A determination as to relevancy and need for any particular information, in the event of dispute, shall be made by the City Council. The hearing may be continued for the purpose of obtaining additional information should the City Council deem it necessarw to consider such information.

Upon hearing, the City Council may reverse the decision of the City Manager in whole or in part or may affirm such decision.

An applicant may appeal such decision to the District Court within thirty (30) days but such appeal shall be upon the substantial evidence rule.

Evidence to be considered upon appeal must be relevant and convincing but need not be in the form required in a suit originating in the District Court but shall be deemed competent evidence if the Court finds that it is of the type commonly relied upon by reasonably prudent men in the conduct of their affairs.

It is recognized that the administrative agency or the court reviewing the decision thereof, in general, will not be the agency responsible for investigation of unlawful activities of a party for the purpose of bringing prosecution and will not have the responsibility for the prosecution or conviction of a party for a criminal offense. Therefore, the administrative official or body or reviewing court shall not be limited in its consideration of character or conduct as a law abiding person to acts for which conviction has been obtained or upon which charges are pend-

ing, but may consider all evidence tending to prove commission of acts prohibited by law without regard to criminal prosecution. Nor shall an acquital upon a criminal charge, where the burden of proof is different from that required herein, be res judicata of the question to be determined.

Upon the issue of character, all acts and circumstances reasonably tending to prove a lack of good character, particularly in those areas affecting the public interest, considering the age of the patrons of such establishment, such as an obvious disregard for the laws, rules and regulations imposed by law and other facts indicating a lack of commitment to adherence to rules established by law, together with evidence of any special skill or expertise in criminal conduct as defined in Title 18, Section 3735, United States Code; shall be admissible, provided, however, that the administrative officer or body or reviewing court shall be guided by the standards employed by Federal District Courts in their consideration of pre-estence reports in criminal cases as provided in Title 18, Section 3577, United States Code, *Williams* v. *New York*, 337 U.S. 241.

For violation of any of the requirements of this ordinance, the City Manager may, upon three (3) days notice to Licensee, revoke the license granted hereunder. The same rights of appeal shall exist upon revocation as upon disapproval of the original application.

A person licensed hereunder, by acceptance of such license authorizes the City and its designated personnel to make inspections of the premises, facilities, manner of operation and character of any employee.

The holder of a license hereunder shall comply with all ordinances and requirements of the City of Mesquite and all laws of the State of Texas.

SECTION 7. There is hereby levied a license fee of Ten Dollars ($10.00) for each coin-operated amusement machine and a license fee of One Hundred Dollars ($100.00) for each coin-operated amusement establishment in the City.

The license of a coin-operated amusement establishment shall not exempt the owner or operator from the license fee of individual machines or obedience to any other ordinance of the City of Mesquite, including the prohibition of pool halls.

SECTION 8. *Exceptions*: This ordinance shall not apply to any agency of the United States Government, State of Texas or political subdivision thereof.

Any charitable organization operating or displaying such machines in connection with charitable activities on premises exempt from payment of ad valorem taxes under State law because of such charitable activities shall be exempt from the provisions of this ordinance to such extent.

SECTION 9. *Definitions*: For the purpose of this ordinance, the following words and terms are defined as follows:

Coin-Operated Amusement Machine—Means a machine or apparatus that may be played or operated by the insertion of a coin and on which games or tests of skill, chance or ability are played, including pinball machines, and any machine initiating games of sport, shooting, or guiding

objects or any machine designed for amusement or relaxation, but not including machines for vending food, drink and tobacco products, music playing or recording or apparatus commonly known as kiddie rides.

Coin-Operated Amusement Establishment:—Means any business or commercial establishment or other building or location wherein three (3) or more coin-operated amusement machines are displayed.

Character as a law abiding citizen shall mean substantially that standard employed by the Supreme Court of the State of Texas in the licensing of attorneys as set forth in Articles 305 and 306, Vernon's Annotated Civil Statutes but expressly excludes conviction by any parties of traffic violations of a Class C misdemeanor grade.

SECTION 10. *Legislative Policy*: It is the policy of the City of Mesquite, in the enforcement and interpretation of this ordinance, to discourage and prohibit the operation, control or interference in the operation of coin-operated amusement facilities by organized crime.

The attraction by the vending industry in general and amusement facilities in particular of criminal elements of our society is recognized and such is determined to be contrary to the welfare of the inhabitants of the City of Mesquite.

SECTION 11. That should any paragraph, sentence, subdivision, clause phrase, section or provision of this ordinance be adjudged or held to be unconsitutional, illegal or invalid, the same shall not affect the validity of this ordinance as a whole or any part or provision hereof other than the part so decided to be unconstitutional, illegal, or invalid and shall not affect the validity of any other provision of the Code of the City of Mesquite.

SECTION 12. That any person violating any of the provisions of this ordinance shall be deemed guilty of a misdemeanor and upon conviction in Corporation Court shall be subject to a fine not to exceed Two Hundred Dollars ($200.00) for each offense.

SECTION 13. The fact that the City of Mesquite has no adequate ordinance regulating the operation of coin-operated machines or establishments wherein such machines are located in the City creates an urgency and an emergency and in the preservation of the public health, safety and welfare of its citizens and after its passage and the publication of the caption as the law and charter in such cases provide.

DULY PASSED AND APPROVED by the City Council of the City of Mesquite, Texas, on the 19th day of December, A.D., 1977.

/s/ *B. J. Smith*
B. J. SMITH
MAYOR

ATTEST:

/s/ *Norma G. McGaughy*
Norma G. McGaughy
City of Secretary

APPROVED AS TO FORM:

.....
Elland Archer
City Attorney

Office - Supreme Court, U.S.
FILED
OCT 27 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1981

No. 80-1577

CITY OF MESQUITE

Appellant

v.

ALADDIN'S CASTLE, INC.

Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANT'S REPLY BRIEF

ELLAND ARCHER
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In The

Supreme Court of The United States

October Term, 1981

No. 80-1577

City of Mesquite

Appellant

v.

Aladdin's Castle, Inc.

Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANT'S REPLY BRIEF

ARGUMENT AND AUTHORITIES

In reply to Appellee's Brief on the merits Appellant submits the following points.

JURISDICTION

Appellee in its brief upon the merits levels an attack upon the jurisdiction of the Court to hear this appeal months after the time allowed by Rule 16, Revised Rules of the Supreme Court of the United States, to file a motion to dismiss or affirm and that period prescribed by Rule 22, Revised Rules of the Supreme Court of the United States, for filing a brief in opposition to a petition for writ of certiorari.

Nor does the argument presented, p. 10, Appelle's Brief appear to be grounded upon jurisdiction but rather argument as to how the Court should approach consideration of the issues.

The "adequate state law grounds" argued by Appellee is a corresponding provision of the Texas Constitution, for all practical purposes, identical to the provision of the United States Constitution in question. A decision upon one necessarily requires a decision upon the other, to wit:

> ". . . . nor be deprived of life, liberty or property, without *due process of law. . . .*"

Fifth Amendment to the United States Constitution, and

> ". . . . nor shall any State deprive any person of life, liberty or property without *due process of law;* nor deny to any person within its jurisdiction the *equal protection of the laws.*"

Fourteenth Amendment to the United States Constitution, and

> "All free men, when they form a social compact, have equal rights. . . ."

Article I, Section 3, Texas Constitution, and

> "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the *due course of the law of the land.*"

Article I, Section 19, Texas Constitution.

It is obvious that, while the language is slightly different, the protection afforded is identical and Appellee makes no attempt to distinguish between these due process and equal protection guarantees of the two Constitutions.

Under the heading of "Interpretive Commentary" at p. 248, Vernon's Constitution of the State of Texas Annotated, an annotation to Article I, Section 19, thereof, it is stated:

> "It has been held by Texas courts that the clause of the Texas Constitution, to the extent that it is identical with the Fourteenth Amendment has placed upon the powers of the state legislature the same restrictions as those which have been held to be imposed by the language of that amendment to the Federal Constitution." (Citing *Mellinger v. City of Houston,* 68 Tex. 37, 3 S.W. 249, 1897).

That the courts construe the due process clauses of the two Constitutions identically is demonstrated by the language in *State v. Texas City,* 295 S.W.2d 697, at 704 (Tex. Civ. App. — Galveston, 1956) affirmed, 157 Tex. 450, 303 S.W.2d 780, appeal dismissed 355 U.S. 603;

> "We entertain no doubt that the due process *clauses* of the *State and Federal Constitutions* constitute an effective restraint upon all powers of government .... See also the interpretive commentary under Art. I, Sec. 19, Vernon's Texas Constitution."

Also, at p. 796,

> ".... we feel that relators' claim of unconstitutionality based upon the due process CLAUS*ES* must be overruled." (Emphasis Added)

Nor can the phrases "equal rights" and "equal protection of the laws" be distinguished. See Interpretive Commentary at p. 218, Vernon's Constitution of the State of Texas, Annotated.

Thus, there is no separate body of Federal and State law involved.

Even the Court of Appeals opinion does not suggest that a distinction exists between the provisions (notes 14 and 15), but treats the provisions as identical.

Therefore, Appellee's suggestion that this Court should decide the case upon State law ground instead of Federal Constitutional grounds is without merit. To decide one is to decide the other and vice versa.

The concept that a state could bar litigants from appeal to the United States Supreme Court by the simple expediency of adopting a constitution exactly identical to the Federal Constitution is not worthy of serious consideration. Yet, if Appellee's argument is correct such a result is indicated.

This Court judicially knows that many States pattern many areas of their State Constitution after the Federal Constitution and that when a provision or state act offends a provision of the Federal Constitution it would logically folow that such offending provision or act would likewise offend a similar guarantee in a State Constitution patterned after such Federal guarantee.

Thus, it is clear that Congress did not intend to bar appeals under 28 U.S.C. 1254(2) simply because a State might have a similar Constitutional guarantee and that decision on the Federal question would, of necessity, decide the identical state question.

Rather, Appellant submits, the intent of 28 U.S.C. 1254 (2) is that *separate* state law questions not be decided by appeal.

Nor will a decision by this Court on the Federal question presented amount to an "advisory opinion" as contended by Appellee, but will be binding upon the Courts of the State of Texas and will settle important questions of law and procedure in all the states comprising the Fifth Circuit.

Therefore, Appellee's jurisdictional attack is both untimely and without merit.

The real question presented by the appeal is not so much the proper construction of the Constitutional provisions, whether it be Federal or State, but the type of test to be applied to the evidence; or, put another way, the burden of proof.

This question is solely a question of Federal Constitutional law developed by the Federal Courts. See *Shapiro v. Thompson*, 394 U.S. 351 (1974) (J. Harlan dissent. op.) for a discussion of the origin of the compelling state interest rule.

Conceded, the Court of Appeals for the Fifth Circuit devotes one and one-half pages of its opinion, 630 F.2d at 1039, to a discussion entitled "rational basis" with additional discussion under the heading "truancy" and "exposure to corrupting influences".

The cornerstone of that court's decision is found, however, at 630 F.2d, 1040

> "The record is entirely devoid of evidence that a person under seventeen years of age has been exposed to a person 'who would promote gambling, the sale of narcotics and other unlawful activities' while in a coin-operated amusement center in Mesquite."

and,

> "If such people do go to the center, there is no evidence that they are drawn by the machines."

Also, same page,

> "The District Court recognized, as we do, that *the City presented no evidence* that such people ever come to these centers." (Emphasis Added)

The Court of Appeals, by the last quoted statement, demonstrates its clear break with the District Court application of the rational basis test.

The District Court, applying the rational basis test, upheld the ordinance without requiring Appellant City to come forward with evidence in accordance with a line of cases by this Court cited at pp. 12-16 of Appellant's Brief, particularly *Vance v. Bradley*, — U.S. — 99 S.Ct. at 950,

> "In an equal protection case of this type, however, *those challenging* the legislative judgment must *convince the court* that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker." (Emphasis Added)

The Court of Appeals broke with the line of cases cited and reversed the District Court by placing the burden of proof upon the City as in strict scrutiny cases, citing cases dealing with such fundamental rights as the right to decide whether or not to bear a child. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. at 505-7 (1965).

Note that the foregoing is not offered by the Court of Appeals under the heading "Strict Scrutiny" but under the purported analysis of the "Rational Basis".

The Court of Appeals, then, applied the strict scrutiny test under both headings by first determining that a fundamental right existed and reasoning backward to conclude that the burden of proof was on the City to come forward with the evidence, absent any presumption of validity and that the City having such burden, failed to carry this burden.

Simply placing a designation of "Rational Basis" above a discussion involving the concepts of strict scrutiny does not render it a finding of lack of a rational basis.

City submits that the Court below failed totally to apply the rational basis test as applied by this Court in the cases

cited in Appellant's original brief and herein and that such error was the basis of that court's reversal of the District Court.

It is true that the appeal is not from the opinion but from the judgment of the Court below reversing the District Court. City submits, however, that the error of the Court below in reversing the District Court was an error in application of Federal law and that any State law concepts are purely incidental.

Neither the District Court nor the Court of Appeals decision suggests that there is any comparable State doctrine that places the burden of proof upon the proponent of State legislation.

The Court below cites *Texas Women's University v. Chayklintaste*, 530 S.W.2d 927 (Tex. 1975) as citing *Reed v. Reed*, 404 U.S. 71 (1971).

Note that in citing *Reed v. Reed*, Supra, the Texas Supreme Court was applying *Federal* law and not State law. All of the authorities cited by the Texas Supreme Court in its opinion except on a point of mootness not material herein were authorities on a federal question, not a State question.

In the same paragraph in which *Reed v. Reed*, Supra, is cited the Texas Court cites *Johnson v. Robinson*, 415 U.S. 361 for the authority (530 S.W.2d at 928),

> "When no suspect categories are involved, *any rational basis* may justify the classification. (Emphasis added).

The Texas Supreme Court further states, 530 S.W.2d at 929,

> "The respondent offered no evidence on this point."

Likewise, in the instant case, Appellee offered no evidence on matters of concern regarding corrupting influences and other state interests.

It is clear then, that under either Federal or State law, the burden of proof is the same, i.e. if "the classification is not based upon any patently invidious basis" *Texas Women's University v. Chayklintaste,* Supra, 530 S.W.2d at 929, citing *Prostrollo v. University of South Dakota,* 507 F.2d at 782 (8th Cir. 1974) the burden is on the challenger of the legislation.

If the classification involves suspect criteria or certain "fundamental" rights, e.g., speech, right to bear or not to bear a child, or other equally basic rights, then the burden is on the proponent.

This is the Federal question presented. When it is resolved, the Texas Courts will follow the decision of this Court as it did in the *Texas Women's University* case.

The other Texas Supreme Court decision cited by the Court of Appeals, *City of University Park v. Benners,* 485 S.W.2d 773 (Tex. 1972) states the Texas rule in accord with the District Court's judgment, 485 S.W.2d at 778-79 as follows:

> "The question which then occurs is whether respondent discharged the *extra-ordinary* burden of showing that the exercise of the police power here was not lawful. As complainant, she was under the burden of showing that no conclusive, or even fairly issuable facts or conditions exists in support of that exercise of the police power." (Emphasis Added)

Thus the law of the State of Texas as enunciated by its highest court and the rule of law of this Court are identical as to burden of proof in cases of this type and the reasons offered by Appellee for deciding the case upon a State law

question are inapplicable and the action of this Court in noting probable jurisdiction was correct.

PROHIBITION V. REGULATION

Appellee offers a line of authorities involving prohibition of activities sanctioned by State statute or regulation by a City contrary to regulation by State Statute.

City of Fort Worth v. McDonald, 293 S.W.2d 256 (Tex. Civ. App. 1956) involved an ordinance of the City of Fort Worth, Texas absolutely prohibiting pinball machines.

Berry v. City of Fort Worth, 132 Tex. 599, 124 S.W.2d 842 (1939) involved an attempt to regulate interest rates and define usury, where sole authority to do so reposed in the State Legislature.

Since Appellee admits, (p. 18, Appellee's Brief) that Mesquite, as a home rule city, may regulate establishments such as Aladdin's Castle, the cases cited by Appellee are not in point.

In *City of Denton v. Denton Home Ice Co.,* 27 S.W.2d 119 (Comm. app.) op. adopted by S.Ct. the Court stated, 27 S.W.2d at 121,

> "The action of the City in this case is characterized as socialistic and *unwise.* It is not within the province of this Court to pass on the wisdom of the law or the wisdom of the City in exercising its power thereunder."

Rather, the law of Texas with respect to legislative power to make classifications is enunciated by the Supreme Court of Texas in *County of Cameron v. Wilson,* 326 S.W.2d 162 (Tex. 1959), at 166,

> "The applicable rule is that 'when a law duly enacted is attacked as unconstitutional' the law is presumed to be valid and doubts as to its constitutionality should always be resolved in favor of constitutionality."

This, then, is the law of the State of Texas with respect to classification. The learned trial judge of the Federal District Court, being familiar with the law of the State of Texas, found no State law problem with the age regulation.

With respect to the Texas law of estoppel, the forum, and not the State determines its application. Since neither the Federal District Court nor the Court of Appeals found any grounds for estoppel that issue is not presented.

All of Appellee's argument, then, with respect to State law, both on jurisdiction and on the merits is without merit.

FOURTEENTH AMENDMENT CHALLENGE

Most of Appellee's argument is a reiteration of points contained in the opinion of the court of appeals and addressed in Appellant's original brief. That argument will not be repeated but is relied upon herein. Appellant will address certain new matters offered by Appellee's Brief.

A. Nature of Classification.

Appellee, at p. 22, Appellee's Brief, disagrees with Appellant's concept of the nature of the classification, denying that the classification under review is that created by the "restriction".

Clearly the "restriction" (age limitation) is the classification.

There is no evidence in the record as to what restrictions may be upon other juvenile activity such as bowling, miniature golf and carnivals and the case was not tried upon such basis. The only comparison was between another coin-operated amusement center called "Fun-Fair" in Big Town Shopping Center (J.A. 38-41).

If Appellee had desired that the case be decided upon this issue, it could have offered the entire city code into evidence in an attempt to show a lack of similar regula-

tion; offered evidence that there were in fact such establishments within the City and that juveniles frequented such places, causing problems similar to those addressed by the instant ordinance.

Appellant could then have attempted to show that the problems addressed by the instant ordinance did not occur at the bowling alleys; that children rarely visit a bowling alley unaccompanied by adults; that the bowling alleys employ off-duty police officers to see that such problems are kept to a minimum because such establishments appeal to *family* type trade.

This, then, is the vice of allowing an issue to be raised upon appeal when not tried in the trial court. Litigants will feel obliged to offer evidence upon each and every *potential* issue that *might* be raised rather than limiting proof to those issues fairly raised by the pleadings and the proof offered by the moving party. Trials could take months to try instead of days and litigants might still miss some potential issues.

It is clear then, that the only classification issue raised in the trial court was the classification of persons under seventeen separately from those over seventeen years of age. *That is the restriction* of the ordinance. The ordinance does not *negate* similar restrictions upon other activities but simply leaves such question to other ordinances, if needed.

B. Merits of the Classification.

Appellant concedes that the line between one day under seventeen years of age and one day over seventeen years of age is very narrow and likely of little significance. Persons slightly under seventeen may well be more mature than other persons over seventeen years of age.

Nevertheless, age is a factor commonly used to classify persons. There is as much rationality in using the seventeenth birthday as a dividing line in the instant case as

using the eighteenth birthday as a line of demarcation in the right to vote or right to contract.

As they approach the age of majority, young people are trying to find their place in society and in life. Peer pressure is strong. Refusal to make a small wager or "smoke a joint" may brand a youth as "chicken". If money is lacking, a person may be "chicken" if he does not join in a small burglary or filch money from home after funds for lunch and other necessities have been exhausted.

Thus, as children progress from infancy to majority, there is no question that some parental supervision is needed. See *Ginsberg v. New York*, 390 U.S. 629 (J. Stewart), (Concurring Opin.), 390 U.S. at 649,

> "I think a State may permissibly determine that, at least in some precise delineated areas, a child — like a captive audience — is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantee."

Appellee, and apparently the Court below, would belittle the financial impact involved by the phrases "spend a quarter on a game" (p. 38 Appellee's Brief) and "drop a quarter in the slot", 630 F.2d 1043, as if there were evidence in the record that most, or even one, for that matter, of the customers only spend twenty-five cents; concluding that the expenditure of money does not involve the "inability to make critical decisions in an informed, mature manner". *Bellotti v. Baird*, 443 U.S. at 634.

It is doubtful that the smoking of one cigarette, or one marijuana cigarette, standing alone, or the consumption of one drink of alcohol, standing alone, would cause any great lasting harm.

These are, however, abstract theories that have no application to real life.

The reason that tobacco and alcohol consumption by minors is restricted or prohibited is that one drink or smoke tends to lead to another and the same is true of "dropping a quarter in the slot".

Appellant fails to follow the logic of Appellee's assertion that the instant ordinance burdens the parent by requiring a visit to the establishment but that the New York law that required the parent to personally visit the bookstore in *Ginsberg v. New York,* 390 U.S. at 639, to purchase the restricted magazine did not burden the parent. It would seem that each time a new magazine was purchased, it would require a separate visit to the bookstore.

It is therefore evident that real differences exist between the class consisting of persons under seventeen years of age and the class of adults; albeit, with some degree of overlapping; and that the classification based thereon does promote legitimate State interests even if the wisdom of the classification be questioned.

THE STATUS OF CHILDREN UNDER THE LAW

Appellee cites numerous authorities as controlling in this case as if the fact situation in the cited cases were analagous to the circumstances in this case.

Appellee cites *Cohen v. California,* 403 U.S. 15 (1971) at p. 33 Appellee's Brief. The only mention of children is a quotation from the State Court. It does not appear that consideration of children played any part in the decision of this Court. Also, the opinion states, 403 U.S. at 18,

> "Thus we deal here with a conviction resting *solely upon 'speech'* . . . ." (Emphasis Added)

N.A.A.C.P. v. Button, 371 U.S. 415 (1963) involved speech and race, but not children.

While it can be assumed that users of the public schools are children, *Gilmore v. City of Montgomery,* 417 U.S. 556

(1974) did not involve rights of persons *as children*, but as a *race*.

Coats v. City of Cincinnati, 402 U.S. 611 (1971) did not involve children.

Conceded, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and *Bellotti v. Baird*, 443 U.S. 622 (1979) do involve the rights of children; *Tinker v. Des Moines Independent Community School District* involving speech and *Bellotti v. Baird* involving the right to decide whether or not to bear a child.

Appellant further concedes that the instant ordinance provides a parental veto over the ability of a minor to play coin-operated amusement machines as in the cases of *Planned Parenthood v. Danforth*, 428 U.S. 52 (right to abortion) and *Ginsberg v. New York*, Supra (right to view "girlie magazines").

Appellee would have this Court, as did the Court of Appeals, select phrases from cases involving matters far removed from the circumstances of the instant case and blindly apply such phrases to the instant case.

In *May v. Anderson*, 345 U.S. 528 (1953) Justice Frankfurter cautioned against this, 345 U.S. at 535, (Frankfurter Concurring Opin.),

> "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards children."

Appellee argues that the act of the Mesquite City Council in classifying minors differently from adults with respect to the right to do as they please is irrational. Yet the combined wisdom of the nation as a whole belies this argument.

Nor is this purely private action. Everywhere parental control is buttressed by State action. States almost uni-

formly make exceptions in their laws to further parental control; even to the extent of allowing parents to physically assault their child (corporal punishment) to subject the child to the will of the parent.

Throughout recorded history the child has been subject to the parent. Whatever our religious persuasion, the passage from the New Testament, Luke, Chapter 2, Verse 51,

> "And he went down with them, and came to Nazareth *and was subject unto them*". (Emphasis Added)

is widely accepted as the norm for a twelve year old child.

Of course, there are limits to which the authority of the parent exists over the child. The State may not exert its power to give a parent an absolute veto over the right to an abortion, *Bellotti v. Baird*, Supra, and school personnel, only partially fulfilling the role of parent, may not prohibit non-obstructive debate.

No doubt, if the corporal punishment was too severe some right of redress would exist.

Likewise, when the action of the parent is deemed too harmful to the child, the State may curtail parental control. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (Child Labor Laws).

With the exception of abortion cases, however, the State act[i]n struck down has been action in derogation of the parental role rather than action enhancing parental control.

FIRST AMENDMENT CLAIM

Appellee raises for the first time in this Court the question of right of expression of the "*Author*" (designer) of the machines contending that the product is *art* and asks this Court to create a whole new body of law providing substantive rights heretofore unheard of in this context.

Note at the outset that the ordinance is *content-neutral.*

The ordinance does not attempt to dictate what theme may be entered or the *appearance* of the machine. Neither the scantily clad female figures on the pinball machines nor the violence of mass destruction of cities, planets or space ships is addressed by this ordinance. Thus, the *designer,* called author, is in no wise inhibited with respect to content.

This is not, however, the ground upon which Appellant opposes this concept.

All objects made or fabricated by man and all natural objects the subject of a selection process by man are subject to a claim of art or expression.

Art, under the law, may not be determined according to one's admiration or lack of admiration of its relative beauty. A representation of a pile of junk or a ramshackle farm house with its characteristic outbuilding may be hung in an art gallery alongside representations of magnolias in bloom or an undisturbed snow-covered landscape because the author has the right to choose his subject and the viewer has the right to appreciate what he will in the field of art.

The rights are not the same, however, when the object itself is offered.

The pile of junk may harbor snakes and rodents and the ramshackle house with no indoor plumbing facilities may create fire and health hazards and both lower property values in the neighborhood.

Thus, the objects themselves are far more subject to regulation than the representation.

Appellant does not contend that art consists only of pictorial representations of objects and acknowledges that many objects may themselves be works of art. Correspondingly many objects of great beauty and intricate design are not art.

A sword or dagger ever so intricately carved, when carried on the person for defense or offense, is a weapon, generally prohibited.

Thus, an object may be art or utility, depending upon its use, purpose and utility together with its setting.

Of course, an object of art may have a degree of utility and *objects of utility may be artfully designed.*

This last observation illustrates the danger inherent in Appellee's position.

If objects of utility, because they are artfully designed are to be given First Amendment protection and the strict scrutiny test applied, governing will be extremely difficult.

Most goods and services are rendered attractive to potential customers. Prostitutes wear makeup and dress in a manner to make their services more attractive and home builders include carpet, paneling and colorful wallpaper to make their product sell.

Appellee states, (p. 31 Appellees's Brief)

> "Development of a new game takes a manufacturer from eight months to a year and requires a substantial investment. (Citation omitted) Games sell for as much as $5000 each".

Appellant submits the following thought:

> "Development of a new model of automobile takes a manufacturer from eight months to a year and requires a substantial investment. Automobiles sell for as much as $5000.00."

Therefore, to clothe the designer of an amusement machine with the status of an author with First Amendment protection would give rise to a similar right to designers of almost every product on the market.

RECENT DECISIONS

Appellee attempts to tie its case to *Schad v. Borough of Mount Ephraim,* 101 S.Ct. 2176 (1981) a zoning case, by citing this Court's language "entertainment", ignoring the fact that this Court in *Schad* did not bestow First Amendment status upon all entertainment. Appellant trusts the States may still regulate, if not *prohibit,* the use of firearms in an urban area, when such activity is for entertainment purposes.

(Note that the City of Mesquite granted Appellee's zoning request. J.A. 69, Appellee's Brief 4 and no dispute exists as to zoning.)

Appellant does not view *Schad v. Borough of Mount Ephraim,* Supra, as new law but simply application of settled principles of law.

1. The activity prohibited consisted of First Amendment protected expression.

2. The Borough of Mount Ephraim failed to meet the burden of strict scrutiny.

In this context Appellant agrees with such holding and argues in accord therewith in its original brief. See quote from *Schneider v. State,* 308 U.S. at 150 quoted in *Schad v. Borough of Mount Ephraim,* Supra, at 101 S.Ct. 2183,

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at *other personal activities* . . . . " (Emphasis Added)

Appellant submits that playing coin-operated machines (not live dancing) constitutes "other personal activities", regulation of which is supported by "mere legislative belief".

Schad v. Borough of Mount Ephraim, Supra, is in no degree contrary to *Ginsberg v. New York,* Supra.

Nor has this Court retreated from its position of upholding the States' power to protect children from economic or social harm. In *Jones v. Helms*, 101 S.Ct. 2434 (1981), this court upheld the power of the State of Georgia to inhibit a parent's right of travel to further its ability to provide parental support for children. In the instant case, the City seeks, as one objective, to aid parents in providing an adequate lunch for their children and to lessen the dependence upon the free lunch program.

This Court, in *H.L. v. Matheson*, 101 S.Ct. 1164 (1981) reiterates the traditional distinction between adults and children. See 101 S.Ct. at 1176 (J. Powell, joined by J. Stewart, concurring opinion)

> "The state may have an interest in the family itself, the institution through which we inculcate and pass down many of our cherished values, *moral and cultural.* (Citation omitted). Parents have a traditional and substantial interest in, as well as a responsibility for, the rearing and welfare of their children, *especially during immature years.*" (Emphasis Added)

See also, 101 S.Ct. at 1177 (J. Stevens, concurring opinion).

> "The States' interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom *even though comparable restraints on adults* would be unconstitutionally impermissible." (Emphasis Added)

Again in *Michael M. v. Superior Court of Sonoma County*, 101 S.Ct. 1200 (1981), this Court upheld the power of the State to legislate differently for protection of minors. Justice Stevens, though dissenting on the basis of a gender based statute, concludes that all teenage sex could be prohibited. While pregnancies and veneral disease result from teenage sex, the same ills are associated with adult behavior.

Another recent (July, 1981) case involving First Amendment protection is *Metromedia, Inc. v. City of San Diego,* 101 S.Ct. 2882, which makes an important distinction in commercial and non-commercial First Amendment activity. Thus, even if Appellee's claim of First Amendment status is correct, the activity is, at best, commercial First Amendment activity and the burden on Appellant should be no greater than that placed upon the State of New York in *Ginsberg v. New York,* Supra, or the City of San Diego in *Metromedia v. City of San Diego,* Supra.

CONCLUSION

The argument of Appellee as to an independent State ground in inapplicable in this case. Appellee relies upon phrases from cases either not involving the relationship between children and the State or that involve basic rights that will affect the minor into majority (right to decide whether or not to bear children).

Thus, this Court should decide the issue as to whether or not playing a coin-operated amusement machine is a fundamental right. If such activity is not a fundamental right, the City's Ordinance should be upheld. If the act of playing a machine is a fundamental right, the case should be remanded to the District Court for additional testimony and proof as the case was tried upon the wrong theory.

Respectfully submitted,

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No. 80-1577

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

CITY OF MESQUITE,

Appellant,

v.

ALADDIN'S CASTLE, INC.,

Appellee,

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF AMUSEMENT AND MUSIC OPERATORS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

Does the Mesquite ordinance deny to the owners or operators of coin-operated amusement machines or to the players of such machines under 17 years of age their rights to due process, equal protection and freedom of expression and liberty guaranteed by the First, Fifth and Fourteenth Amendments to the Constitution of the United States?

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SUPREME COURT OF THE UNITED STATES
October Term, 1980

CITY OF MESQUITE,
Appellant,

v.

ALADDIN'S CASTLE, INC.,
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On Appeal from the
United States Court of Appeals
for the Fifth Circuit

BRIEF OF AMUSEMENT AND MUSIC OPERATORS ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF APPELLEE

Amusement and Music Operators Association, Inc. respectfully submits this brief amicus curiae. All of the parties to this cause, through their counsel, have consented to this filing;

their written consents supplied in accordance with Rule 36 have been filed with the Clerk of this Court.

IDENTIFICATION AND INTEREST OF THIS AMICUS

Amusement and Music Operators Association, Inc. is the national trade association of operators of coin-operated amusement games and jukeboxes. The Association has approximately 1500 members, most of whom are operators of these machines. Industry surveys indicate that there are estimated to be altogether between 3000 and 5000 operators, who operate possibly as many as 1,000,000 amusement games and jukeboxes, in about 300,000 establishments located in cities

and communities, large and small, throughout the United States. Amusement centers, such as Aladdin's Castle center in the shopping mall at Mesquite, Texas, account for substantial numbers of the coin-operated amusement machines that are now in operation.

The amusement games industry consists of the manufacturers of whom there are at least 13 in the United States (Amusement Device Manufacturers Association, amicus brief), the independent distributors of games machines, the operators, and the location owners referred to above. This amicus represents the operators.

There are many types of coin-operated amusement games, ranging all the

way from kiddie rides to the video-electronic devices that are so popular today. Some devices like the kiddie rides are designed mainly for entertainment of the very young. Some, like the modern pinball machines are equipped with "flippers," that emphasize the skill aspects of the games.[1/] Others

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[1/] Appellate courts in several states have recognized this. State v. Bloss, ___ Hawaii ___, 613 P. 2d 354 (1980); People v. Palazzolo, 62 Mich. App. 140, 233 N.W. 2d 216 (1975); Cossack v. City of Los Angeles, 114 Cal. Rptr. 460, 523 P. 2d 260 (1974). In State v. Bloss the Hawaii Supreme Court quoted with approval from the Michigan Court of Appeals' decision in the Palazzolo case as follows (___ Hawaii at p. ___, 613 P. 2d at p. 360):

"Modern pinball machines involve skill to a much greater extent because of the addition of 'flippers.' Flippers are bars operated by a pushbutton which can

1/ continued

like the coin-operated game of 'foosball,' are modelled after publicly popular sports, and sometimes are operated in organized tournaments where many players compete against each other. Still others simulate auto-racing and spaceship 'wars,' games which involve high degrees of hand-eye-ear coordination

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1/ continued

be used to flip the balls upwards, back into the playing field, thus keeping the ball in play longer and enabling the player to attain a higher score. Thus the difference between the old-style and modern pinball machines is apparent. Attaining a high score in the old-style flipperless game depended almost completely on chance. A modern pinball machine, however, armed with one or more pairs of flippers, allows for a much greater variance in scores, depending on the player's skill in manipulating the flippers."

and intense mental concentration. Coin-operated video games which are so popular today are probably the most complicated and sophisticated of all such amusement devices. Some of these are described in recent court decisions.[2/]

2/ Stern Electronics, Inc. v. Kaufman, (E.D.N.Y. decided May 22, 1981, at pp. 7-8):

"Stern's video game 'Scramble,' . . . presents on a screen a series of images projected by a cathode ray tube which depicts a spaceship similtaneously trying to navigate a mountainous airspace, destroy enemy fuel depots, evade deadly ground fire, and prevail in an aerial dog-fight, while at the same time watching carefully over a diminishing fuel supply. In essence, the work is a movie in which the viewer participates in the action as the fearless pilot controlling the space-ship."

Wnek Vending & Amusement Co., Inc. v. City of Buffalo, 343 N.Y.S. 2d 608,617 (1980):

"Today, coin-operated video games are distributed to shopping malls, movie

2/ continued

Coin-operated amusement games provide opportunities for players' personal participation, as well as for their viewing and listening entertainment. The games provide opportunities also for enhancement of physical skills as well as for stimulating mental exercise. Many of

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2/ continued

theatres, bowling alleys, roller rinks, pizzerias, and neighborhood grocery stores. Video games, originally introduced in Japan several years ago and mass-marketed in this country for the last eighteen months, have recently been adapted for use on television screens for home entertainment. A recent SPACE INVADERS competition in New York City, sponsored by a reputable manufacturer and distributor of video games, attracted over 4,000 entrants and awarded as the grand prize, not surprisingly, a $2,000 ASTEROIDS table top video game. (N.Y. Times, November 9, 1980 p. 24)."

the games also provide opportunities for the players to compete against each other or in tournaments. In the modern amusement center, where so many of the games machines are owned and operated, as at Aladdin's in Mesquite City, these machines provide wholesome entertainment, and they have earned the widely accepted place in modern society that they have achieved.

The question whether a municipal ordinance such as the one in this case is constitutionally valid is one of vital importance to all operators of coin-operated amusement machines, and the Court's decision will have significant impact upon them as well as the youthful customers who desire to play their

machines.

This amicus urges the Court to view the issues in this case in the context of the constitutional rights of all citizens who will be affected by the Court's decision — the businessmen who supply amusement and musical entertainment by means of coin-operated machines, and their customers, especially those under the prescribed age, who would play the machines.

SUMMARY OF THE ARGUMENT

The Fifth Circuit is correct in holding that the Mesquite ordinance does not meet the rational basis test and that it violates the constitutional rights of Appellee and Appellee's young customers under the First and Fourteenth Amendments

to the Constitution of the United States.

Contrary to Appellant's assertion, the applicable standard of review is not the paramount issue in this case. The ordinance does not meet the minimum rational basis test and, a fortiori, it does not meet the strict scrutiny test. Even if the strict scrutiny test is applied, however, the Fifth Circuit is correct in holding that the ordinance arbitrarily and discriminatorily violates both the rights of Appellee and its young customers to freedom of expression and liberty of association contrary to the First and Fourteenth Amendments to the Constitution of the United States.

Both courts below are correct in holding that the ordinance's language

"connection with criminal elements" is void for vagueness under the due process clause of the Fourteenth Amendment.

We adopt the arguments of the Appellee on all these issues and add our own on the specific issue of freedom to provide and to receive entertainment by coin-operated amusement machines in a carefully-run amusement center like Aladdin's.

ARGUMENT

The Mesquite ordinance denies to Appellee and its young customers their rights to provide and to receive entertainment by coin-operated amusement machines contrary to the First and Fourteenth Amendments to the Constitution of the United States.

The Mesquite city ordinance here in issue, Ordinance 1353, bans the playing of coin-operated amusement machines by persons under 17, unless accompanied by a parent or guardian, in commercial amusement establishments. The ordinance includes the following definition (see Jurisdictional Statement, pp. 11, 12):

> "Coin-Operated Amusement Machine — Means a machine or apparatus that may be played or operated by the insertion of a coin and on which games or tests of skill, chance or ability are played, including pinball machines, and any machine initiating games of sport, shooting, or guiding objects or any machine designed for amusement or relaxation, but not including machines for vending food, drink and tobacco products, music playing or recording or apparatus commonly known as kiddie rides." (Emphasis supplied).

Amusement establishments do not include those with less than three such machines

(Id. p. 12), or those operated by charities (Id. p. 11).

The ordinance's states justification is that coin-operated amusement establishments tend to attract youthful patrons, that the congregation of such patrons creates problems of policing in order to protect them from the influence of those who would promote gambling, drug sales, and other unlawful activities, and that it is vital to the safety and welfare of the inhabitants of Mesquite, since the City has a special duty to protect those of tender years and since the attraction of such establishments to those under 17 years is detrimental to them and to the health and welfare of the inhabitants. Yet no such ban applies to

the congregation of minors in other places where they normally congregate: parks, ballparks, sandlots, swimming pools, and movies, to name but a few. It does not even ban the congregation of minors, unaccompanied by parents, in amusement establishments so long as they do not play the coin-operated amusement machines. The net effect of the ordinance therefore zeroes in on an extremely narrow target.

The City's argument adds another justification: the prevention of truancy. Yet the ordinance applies on Saturdays, Sundays, and holidays, and during non-school hours on school days, and during summer vacations.

There is no contention that amuse-

ment machines or the games that are played on them are bad per se. There is no contention that the machines or the games intrinsically impose any kind of threat. There is not even a claim that sex, obscenity, drugs or liquor are shown on the machines. There is simply a claim that youths are attracted to commercially-operated, coin-operated amusement machines, and that they tend to congregate around such machines, where they are subject to the influence of gamblers, drug pushers and other evil-doers.

Indeed, there could hardly be an argument that amusement machines are bad per se. A body of law is developing which fairly extols such machines as

contributions to a person's mental development. State v. Bloss, supra, p. 4; People v. Palazzolo, supra, p. 4; Cossack v. City of Los Angeles, supra, p. 4; Stern Electronics, Inc. v. Kaufman, supra, p. 6; Wnek Vending & Amusement Co. v. City of Buffalo, supra, p. 6.

The Ordinance shows on its face that its target is the "congregation" of youths. But "congregation" is simply another way of saying "association," and the freedom of association is a First Amendment freedom. The City's task in upholding the Ordinance is compounded by the fact that the congregation of youths is for the purpose of entertainment, and "Entertainment, as well as political and

ideological speech, is protected" by the First Amendment. Schad v. Borough of Mount Ephraim, 101 S.Ct. 2176, 2181 (1981).

Schad is particularly pertinent. It came down on June 1, 1981, six months after the decision below, and so was not available to the Fifth Circuit. It makes the Fifth Circuit's decision well-nigh impregnable.

Schad struck down a zoning ordinance which banned the showing, by means of a coin-operated mechanism, of live nude dancing in any establishment in the Borough of Mount Ephraim. The Court said (101 S.Ct. 2176, 2181):

> "By excluding live entertainment throughout the Borough, the Mount Ephraim ordinance prohibits a wide

> range of expression that has long been held to be within the protections of the First and Fourteenth Amendments. Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee. (Citations omitted). Nor may an entertainment program be prohibited solely because it displays the nude human figure. 'Nudity alone' does not place otherwise protected material outside the mantle of the First Amendment. (Citations omitted). Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation."

Erznoznik v. City of Jacksonville, 422 U.S. 211, 95 S.Ct. 2268, 4 L. Ed. 2d 125 (1975), involved, as does the instant case, a city's police power to protect children. Jacksonville had adopted an ordinance making it unlawful to exhibit,

in drive-in theaters, motion pictures which involve a showing of nudity if such pictures could be seen from a public place. Appellant then brought a declaratory action to test the validity of the ordinance and the city defended on the ground, inter alia, that the ordinance was an exercise of its police power to protect children. It maintained that even though it could not prohibit the display of films containing nudity to adults, it could reasonably protect minors from this type of visual influence.

The Court held that this defense was insufficient and it invalidated the ordinance. In doing so it held that

"minors are entitled to a significant measure of First Amendment protection" and that "only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them" (Erznoznik v. City of Jackson, supra, at 212,213). The restriction against any showing of nudity was held to be too broad. The Court said,

> "Nor can such a broad restriction be justified by any other governmental interest pertaining to minors. Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. See Tinker v. Des Moines

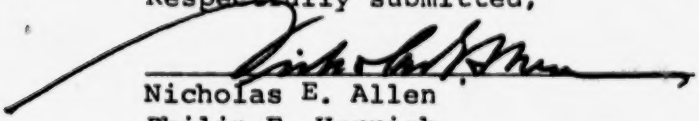
School Dist., supra. Cf. West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). Thus, if Jacksonville's ordinance is intended to regulate expression accessible to minors it is overbroad in its proscription." (Id. at 213, 214).

Schad and Erzoznik both involve freedom of speech, but it is no great step to go from freedom of speech to freedom of association. Each is a First Amendment freedom. Indeed, they are often overlapping. NAACP v. Alabama, 357 U.S. 449, 460, 78 S.Ct. 1163, 1171 (1958); Griswold v. Connecticut, 381 U.S. 479, 483, 85 S.Ct. 1678, 1681 (1965).

CONCLUSION

For the foregoing reasons we join the Appellees and respectfully urge the Court to affirm the decision of the Fifth Circuit Court of Appeals in its entirety.

Respectfully submitted,



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CITY OF MESQUITE,

Appellant,

v.

ALADDIN'S CASTLE, INC.,

Appellee.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE AMUSEMENT DEVICE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

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* Copies of these periodicals have been filed with the Clerk of the Court.

IN THE

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CITY OF MESQUITE,

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Appellee.

ON APPEAL FROM
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FOR THE FIFTH CIRCUIT

BRIEF FOR THE AMUSEMENT DEVICE MANUFACTURERS ASSOCIATION AS AMICUS CURIAE

The Amusement Device Manufacturers Association respectfully submits this brief *amicus curiae*. All of the parties to this cause, through their counsel, have consented to this filing; their written consents have been filed with the Clerk pursuant to Rule 36.

INTEREST OF AMICUS

The Amusement Device Manufacturers Association ("ADMA") is a trade association dedicated to promoting the interests of manufacturers of coin-operated amusement games. The Association is presently composed of 13 members: Atari,

Inc., Centuri, Inc., Cinematronics, Inc., D. Gottlieb & Co., Exidy, Inc., Game Plan, Inc., Gremlin Industries, Inc., Rock-Ola Manufacturing Co., Stern Electronics, Inc., Taito America Corp., Universal U. S. A. Inc., U. S. Billiards, Inc. and Williams Electronics, Inc. All of the members of the Association manufacture games that are used exclusively for amusement, like the games Aladdin's Castle, Inc. has installed in its arcade in the shopping mall in the City of Mesquite. Games made by some or all of these companies would probably be installed at that arcade. None of the ADMA members manufactures gambling equipment.

Because of advances in computer technology and micro-electronics, the amusement game industry has moved far beyond the days of the old electro-mechanical pinball machine. Although pinball machines are still popular, the typical coin-operated amusement device of the 1980's is a color television screen coupled to a computer which is programmed to display a series of images, often accompanied by creative sound effects, much like a movie or cartoon. The player pits his or her skill against the computer in maneuvering "players" (such as football players, baseball players, soccer stars, space ships, and cars) to score points or achieve a goal. Most of the games are designed so that they can be played by two or more players, each pitting his or her skill against the other. These games are highly sophisticated and cost several thousand dollars each.

The federal courts have recognized that these video games are useful contributions to the arts and sciences and worthy of copyright protection under the Constitution and copyright law. *See, e.g., Stern Electronics, Inc.* v. *Kaufman*, No. 80 C 3248 (E. D. N. Y. May 22, 1981), *appeal docketed*, No. 81-7411 (2d Cir. June 2, 1981); *Cinematronics, Inc.* v. *K. Noma Enterprise*

Co., No. Civ. 81-439 (D. Ariz. May 22, 1981); *Williams Electronics, Inc.* v. *Artic International, Inc.*, No. 81-1852 (D. N. J. June 24, 1981); *Midway Mfg. Co.* v. *Drikschneider*, No. 81-0-243 (D. Neb. July 15, 1981). Indeed, the United States Army is experimenting with adapting the games to develop hand-eye coordination and image identification among our military. Ludvigsen, *Combat In A Box*, ARMY, Aug. 1981, at 14, 16-19; *Army Considers Video Games To Train, Save*, CHICAGO SUN-TIMES, June 23, 1981 at 18, col. 2.

The ADMA is vitally interested in the outcome of this case because the livelihood of its members depends on the availability of its products to the public. The industry now plays a significant role in the American economy; over the last ten years the production of amusement games has grown so that more than a billion dollars worth of games are produced each year. *See generally* Bernstein, *Atari And The Video-Game Explosion*, FORTUNE, July 27, 1981 at 40. According to one source, "Americans spent $9 billion last year playing coin-operated video and electronic games and only $3 billion going to the movies." WALL STREET J., Aug. 20, 1981, at 1, col. 5. Indeed some of the principal manufacturers of coin-operated games are subsidiaries of major entertainment conglomerates, such as Warner Communications, Inc. (Atari, Inc.), Columbia Pictures Industries, Inc. (D. Gottlieb & Co.) and Gulf + Western Industries, Inc. (Gremlin Industries, Inc.). It is estimated that between 50 and 75 percent of the industry's ultimate customers, the players of the games, are 18 years of age or younger. REPLAY, Aug. 1981 at 25. If municipalities can arbitrarily exclude these citizens from amusement arcades, the industry will be grievously crippled, and young people across the country, particularly those who cannot afford to purchase their own games, will be denied the opportunity to pursue a challenging and creative form of recreation.

ARGUMENT

The Fifth Circuit Court of Appeals and Appellee have cogently demonstrated the constitutional infirmities of the City of Mesquite ordinance before the Court. The ordinance's "connection with criminal elements" language is patently void for vagueness, *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939), and the City's under-17-year-old age ban was applied to Aladdin's in such an arbitrary and capricious manner that it falls under any level of equal protection analysis. *United States Department of Agriculture* v. *Moreno*, 413 U. S. 528, 537-38 (1973); *United States Department of Agriculture* v. *Murry*, 413 U. S. 508, 514 (1973). We will not duplicate that discussion.

Rather, we will focus on the First Amendment rights of businessmen in the amusement industry and their customers and the important Fourteenth Amendment liberty interests of minors to frequent public places and engage in an activity that by no stretch of anyone's imagination is harmful. Further, we shall demonstrate that an under-17-year-old age ban applied to the coin-operated amusement device industry of the 1980's is so irrational and arbitrary as to violate the Equal Protection Clause of the Fourteenth Amendment.

I

THE UNDER 17 YEAR AGE BAN VIOLATES THE FIRST AMENDMENT RIGHTS OF ALADDIN'S AND THE LIBERTY OF ITS CUSTOMERS.

The City of Mesquite's under-17-year-old age ban is not an ordinary economic regulation. Mesquite's ordinance violates important First and Fourteenth Amendment rights in addition to those ably identified by the Fifth Circuit Court of Appeals.

First. The freedom of expression protected by the First Amendment encompasses the right to present entertainment to the public. *Winters* v. *New York*, 333 U. S. 507, 510 (1948). Only last term this Court held that the First Amendment

protects the right of amusement establishments to offer coin-operated devices to customers to view live nude dancing in *Schad* v. *Borough of Mount Ephraim*, 101 S. Ct. 2176 (1981). Like movies, plays, and concerts, such entertainment "is not without its First Amendment protections from official regulation." *Id.* at 2181.

The operation of Aladdin's coin-operated amusement devices is even more entitled to Constitutional protection. The video games of Aladdin's and the ADMA are very similar to movies and, indeed, are receiving copyright protection on the grounds that they *are* movies:

> Stern's video game "Scramble," . . . presents on a screen a series of images projected by a cathode ray tube which depicts a spaceship simultaneously trying to navigate a mountainous airspace, destroy enemy fuel depots, evade deadly ground fire, and prevail in an aerial dogfight, while at the same time watching carefully over a diminishing fuel supply. *In essence, the work is a movie in which the viewer participates in the action as the fearless pilot controlling the spaceship.*

Stern Electronics, Inc. v. *Kaufman*, No. 80 C 3248, slip op. at 7-8 (E. D. N. Y. May 22, 1981) (emphasis supplied), *appeal docketed*, No. 81-7411 (2d Cir. June 2, 1981). *Accord, Cinematronics, Inc.* v. *K. Noma Enterprise Co.*, No. Civ. 81-439 (D. Ariz. May 22, 1981).

Aladdin's customers have a First Amendment right to view the entertainment. *See Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 756-57 (1976) (the right to view expression is reciprocal). Moreover, the rights of Aladdin's customers are even stronger than the rights of the audience in *Schad* because Aladdin's customers, very often in association with other players, are active participants in the drama. And there can be no claim that this

activity, unlike the performance in *Schad*, is unsuitable for the eyes of the young. Rather, as noted above (page 3), the educational benefits and skills acquired from such games are so valuable that the U.S. Department of Defense plans to train members of the armed forces in precisely the type of game exercises covered by the ordinance here under challenge.

Second. The Fourteenth Amendment's liberty guarantee must encompass the right to engage in recreation that is not inherently harmful to the participant and does not interfere with the rights of others. *See Meyer* v. *Nebraska*, 262 U. S. 390, 399 (1923). Recreation is self-expression. As one noted expert has recognized:

> Like our vernacular tongues, all games are media of interpersonal communication, and they could have neither existence nor meaning except as extensions of our immediate inner lives. If we take a tennis racket in hand, or thirteen playing cards, we consent to being a part of a dynamic mechanism in an artificially contrived situation. Is this not the reason we enjoy those games most that mimic other situations in our work and social lives? Do not our favorite games provide a release from the monopolistic tyranny of the social machine? In a word, does not Aristotle's idea of drama as a mimetic reenactment and relief from our besetting pressures apply perfectly to all kinds of games and dance and fun? For fun or games to be welcome, they must convey an echo of workaday life. On the other hand, a man or society without games is one sunk in the zombie trance of the automation. Art and games enable us to stand aside from the material pressures of routine and convention, observing and questioning. Games as popular art forms offer to all an immediate means of participation in the full life of a society, such as no single role or job can offer to any man.
>
> * * *
>
> That games are extensions, not of our private but of our social selves, and that they are media of communication, should now be plain.

M. McLuhan, Understanding Media: The Extensions of Man 237-38, 245 (1964).

We believe that the right to assemble and associate with others to play games, whether the game be basketball, baseball, bridge, Skittles, Monopoly or pinball, is necessary for citizens to lead full and meaningful lives. Undeniably such recreation may often be construed as a form of conduct and thus subject to regulation. Also undeniably, it is a form of expression, and the liberty to choose one's recreation should not be abridged by the State absent a substantial and compelling public interest. If Presidents, congressmen and their friends can play golf at Burning Tree Country Club, then there is no principled basis for Government to deny citizens, be they young or old, the right to associate with their friends and play video and pinball games at a shopping mall open to the public.

The "peculiar vulnerability of children" does not lessen these constitutional protections for those under 17 years of age here. Not even the City of Mesquite has dared to argue that playing the amusement games of Aladdin's and the members of the ADMA poses a special moral or physical danger to youth. This is not a case where liquor, illicit drugs, X-rated movies, or material that is obscene to minors is purveyed, and a restriction on the entertainment could arguably be justified. *Ginsberg* v. *New York*, 390 U. S. 629 (1968). This is a case where the amusement games "cannot reasonably be regarded as harmful." *Meyer* v. *Nebraska*, 262 U. S. 390, 400 (1923).

In our society parents, not the State, are vested with the right and responsibility to rear their children. *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972). Playing a computer game is not a "critical choice," such as voting, which requires special solicitude for mature, informed judgment. *Ginsberg* v. *New York*, 390 U. S. 629, 649-50 (1968) (Stewart, J., concurring). That the City of Mesquite allows those under 17 to play amusement games if accompanied by a parent does not save the age restriction. There is no interest in safety (*e.g.*, the hazards of swimming in a pool), and there is no other interest, that can justify this burden on a young person's right to engage in

amusement that is neither harmful to the player nor to the public. There are many parents who would readily allow their children to play Aladdin's games without their personal supervision. To suggest that parents must accompany their children every time the children want to play amusement games is to impose an impossible burden on this form of recreation. Very little baseball would be played if parents were required to accompany their children every time each child wanted to play baseball in a public park.

The First Amendment and the Due Process Clause of the Fourteenth Amendment require that a law that impairs, even incidentally, protected liberties, be narrowly drawn and directly related to a real and substantial state interest. *United States* v. *O'Brien,* 391 U. S. 367, 376-77 (1968). Here, there has not been and cannot be a showing that the age ban discourages or prevents social malefactors from preying upon young people. If the City's real purpose is to curb truancy and other anti-social conduct, it should enforce its compulsory school attendance and drug laws, not put an entertainment center that has done no wrong out of business. *Schneider* v. *State,* 308 U. S. 147, 162-64 (1939). If an arcade is unsafe or unsanitary or creates a nuisance, the city can bring the full force of its health codes, building and zoning codes and other traditional remedies to bear, subject to limitations set forth in *Schad.* Thus, without having to resort to an arbitrary age ban on the playing of amusement games, the city has at its disposal traditional remedies designed to deal with every single objection which the age ban purportedly seeks to cure.

By allowing adults to patronize Aladdin's business, the City of Mesquite recognized, by implication, that the amusement is innocent *per se.* This comports with the nearly universal recognition that today's video and pinball games are innocent games of skill and are not to be confused with the disguised gambling devices of another era. *See, e.g., People* v. *Palazzolo,*

62 Mich. App. 140, 143-44, 233 N. W. 2d 216, 218 (1975); *Cossack* v. *City of Los Angeles*, 11 Cal. 3d 726, 733-34, 114 Cal. Rptr. 460, 465, 523 P. 2d 260, 265 (1974); *State* v. *Bloss*, 62 Hawaii Adv. Sh. No. 6932, 613 P. 2d 354, 361 (1980); King, *The Rise and Decline of Coin-Machine Gambling*, 55 J. CRIM. L. C. & P. S. 199 (1964). As one court recently held,

> [T]he video games which petitioners seek to distribute are games of skill and therefore are not gambling devices. They depend upon eye-hand co-ordination, reflexes, muscular control and above all, concentration. Proper timing in aiming and firing is essential. The eyes and hands of an operator of a video game are in constant motion. The player must continually adapt to instantaneous changes in the position of his laser bases relative to the location of the invader projectiles. The amount of physical skill and energy required to successfully play a video game is enormous.

Wnek Vending & Amusements Co. v. *City of Buffalo*, 107 Misc. 2d 353, 357, 434 N. Y. S. 2d 608, 612-13 (Sup. Ct. 1980).

Finally and signally, the City of Mesquite itself has recognized that the under-17-years age restriction serves no legitimate state interest. When Aladdin's advised the City that it could not operate a profitable center if the age restriction were enforced, the City repealed the ban. Only many months later and *after* Aladdin's had invested tens of thousands of dollars, and prevailed in State court on the vagueness issue, did the City reenact the age ban. (630 F. 2d at 1033-34.) The record is clear that the City did so (knowing that Aladdin's had relied on the repeal as the basis for its investment) to drive Aladdin's out of business, not to address a social problem. *See Schad* v. *Borough of Mount Ephraim*, 101 S. Ct. 2176, 2188 (1981) (Stevens, J. concurring).

In sum, when viewed in the context of this outrageous behavior, the City's purported justifications for the age ban—to prevent truancy and to protect the young from unsavory characters—must be seen for the *ex post facto* excuses they are.

II

THE AGE BAN IS NOT RATIONALLY RELATED TO ANY STATE INTEREST.

Even if the City's under-17-year-old age ban did not impair the First and Fourteenth Amendment rights of Aladdin's and its prospective young patrons, it would fall before traditional "rational basis" equal protection analysis. Constitutional law has gone beyond the *Lochneresque* and *a priori* assumptions of *Murphy* v. *California*, 225 U. S. 623 (1912). The day is long past when this Court will accept conclusive, irrebuttable presumptions that "a harmful tendency is a fact requiring no proof, and incapable of being controverted by . . . testimony." *Murphy*, 225 U. S. at 629. *United States Department of Agriculture* v. *Murry*, 413 U. S. 508, 514 (1973); *Stanley* v. *Illinois*, 405 U. S. 645, 656-57 (1972); *Bell* v. *Burson*, 402 U. S. 535, 541 (1971). This Court, as the Fifth Circuit rightly found, has recognized that Victorian notions of the evils of idleness by themselves can no longer sustain legislation. *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 164 (1972) (idleness, extolled by poets and essayists, is one of the "unwritten amenities" of life). Indeed, Americans possess "the right . . . to gather . . . for social . . . purposes." *Coates* v. *City of Cincinnati*, 402 U. S. 611, 615 (1971).

Common sense teaches that in today's world there is no basis in fact to attach the *Murphy* stigma of unwholesomeness to amusement centers like Aladdin's. As one New York Court recently observed:

> Today, coin-operated video games are distributed to shopping malls, movie theatres, bowling alleys, roller rinks, pizzerias, and neighborhood grocery stores. Video games, originally introduced in Japan several years ago and mass-marketed in this country for the last 18 months, have recently been adapted for use on television screens for home entertainment. A recent Space Invaders com-

> petition in New York City, sponsored by a reputable manufacturer and distributor of video games, attracted over 4,000 entrants and awarded as the grand prize, not surprisingly, a $2,000 Asteroids table top video game. (*New York Times,* Nov. 9, 1980 p. 24). Thus, the contemporary context in which video games are manufactured, distributed, and operated bears little resemblance to the Buffalo atmosphere in 1952.

Wnek Vending & Amusements Co. v. *City of Buffalo,* 107 Misc. 2d 353, 366, 434 N. Y. S. 2d 608, 617 (Sup. Ct. 1980).

Pinball machines and video games are no different from baseball, bowling and other amusements our young people are encouraged to play. As the Supreme Court of Hawaii held in *State* v. *Bloss,* 62 Hawaii Adv. Sh. No. 6932, 613 P. 2d 354, 361 (1980) in striking down a law, like the one in issue here, which restricted children under 18 from playing amusement games without their parents (emphasis supplied):

> Modern pinball machines do not belong in a statute drafted to regulate the effect of old-style pinball and slot machines, games where skill played no part and chance alone governed the players' scores. *Modern pinball machines are indistinguishable from other skill-related amusement games which minors are allowed to play.* Therefore, while HRS § 445-43 was justified at the time of its enactment in 1945, we must conclude that under the rational-basis test the statute no longer bears a reasonable or substantial relationship to the harm sought to be avoided. Accordingly, we find that HRS § 445-43 as a whole and as interpreted and implemented in this case violates the equal protection of the laws guaranteed by the State and Federal constitutions and is unconstitutional.

See Rollins v. *State,* 354 So. 2d 61, 64 (Fla. 1978) (age restriction for billiard parlors held unconstitutional; no rational basis for distinguishing among games).

A classification that cannot even hope to achieve its stated goals, like the age ban here, is without rational basis and violates the Equal Protection Clause. *Eisenstadt* v. *Baird,* 405

U. S. 438, 447-50 (1972). Since long before Huck Finn and Tom Sawyer, there have been truants, and the City's age ban will not prevent those who cut school from doing so. The age restriction here is not confined to school hours, and applies even during weekends and summer vacations—further evidence of its irrationality.

Nor will the ban stop social undesirables from associating with young people. Mesquite will never be able to achieve such a goal unless it is ready to bar young people unaccompanied by their parents from school yards, fast food establishments, bowling alleys, movie theaters, parks, and, indeed, any public street. It is fundamentally unfair to foreclose Aladdin's business, while allowing other public businesses where the young congregate, including the shopping mall itself, on the speculative fear that others (over whom Aladdin's has no control) may possibly transgress some law.

In sum, putting Aladdin's out of business furthers no state interest. No one would seriously argue that the City of Houston could bar young people from attending baseball games at the Astrodome; yet, baseball games may be attended by truants, and liquor is sold there. Our system of freedom would never approve such a restriction on liberty to enjoy the national pastime. There is no principled basis on which the restriction urged here is any less an invidious discrimination wholly unrelated to any state interest.

CONCLUSION

For the foregoing reasons, we join with Appellee and respectfully submit that the decision of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1577

CITY OF MESQUITE,

Appellant,

vs.

ALADDIN'S CASTLE, INC.,

Appellee.

ON APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR ATARI, INC. AS AMICUS CURIAE

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BRIEF FOR ATARI, INC. AS AMICUS CURIAE

Atari, Inc. respectfully submits this brief as *amicus curiae*. All of the parties to this cause, through their counsel, have consented to this filing. Written consents have been filed with the Clerk pursuant to Rule 36.2 of this Court.

INTEREST OF AMICUS

Atari, Inc., a subsidiary of Warner Communications, Inc., is the first and largest manufacturer of coin-operated video games. Atari's "PONG" game gave birth to the coin-operated video game business in 1970. Atari's "ASTEROIDS" game proved the most popular video-game ever invented. It introduced tens of millions of Americans to the excitement of computer-controlled amusement machines.

Atari shares a vital interest in the outcome of this case. Obvious financial harm to Atari's business would follow this Court's authorization of restrictive ordinances such as Mesquite's. Atari also shares the interest of the industry, its customers, and the public in a reasoned resolution of the important issues this case raises. Atari views this case, however, as a peculiarly poor vehicle to determine whether a municipality may curtail the liberty interests of American youth in pursuing legitimate recreation, while, in the process destroying a legitimate business and stifling a young industry. Sound, conventional constitutional doctrine supports the judgment of the Court of Appeals.

SUMMARY OF ARGUMENT

Mesquite would use this case to raise issues of far-reaching implications: To what extent, and on what basis, can a municipality abridge youths' "right of social association?" How far can a municipality go in destroying a legitimate business without violating due process and equal protection rights? Atari submits that, in view of the established principles supporting the lower court's ruling, the Court need not, and should not, resolve those novel issues in the context of this case. The City of Mesquite has not properly invoked the Court's appellate jurisdiction. Moreover, the inadequacies in the record and the existence of sound reasons to uphold the Court of Appeals' judgment suggest the case does not deserve plenary review.

ARGUMENT

Atari, Inc., as *amicus curiae,* respectfully suggests: (1) the appeal should be dismissed because this Court lacks jurisdiction; and (2) treating the appeal as a petition for a writ of certiorari, the petition should be denied.

The Court of Appeals held invalid both aspects of Mesquite Ordinance No. 1353: (1) the prohibition of a license for a coin-operated amusement center to anyone having a "connection with criminal elements"[1]; and (2) the restriction of admission to coin-operated amusement centers to persons 17 years of age or older.

Mesquite has not Properly Invoked this Court's Appellate Jurisdiction

The Court of Appeals held that Mesquite's age-limitation ordinance violated both the United States and Texas constitutional guarantees of due process of law and equal protection of the laws. 630 F.2d at 1038-39. Mesquite has appealed, however, only from the ruling insofar as it rests upon an interpretation of the federal Constitution. Mesquite's Jurisdictional Statement raises only the federal question and lists only two laws as involved on the appeal—the Fourteenth Amendment to the Constitution of the United States and Ordinance No. 1353 of the Code of the City of Mesquite. The Jurisdictional Statement makes no attempt to appeal the Court of Appeals' ruling with respect to Article I, Section 19 or Article I, Section 3 of the Texas Constitution. Those Texas constitutional provisions are that State's counterparts to the federal due process and equal protection clauses, respectively.

The result is that this Court's review of the federal constitutional question would not affect the judgment below even if Mesquite prevailed here. Thus, plenary consideration of the age-limitation issue could result only in an advisory opinion,

[1]Atari supports the Fifth Circuit's holding that the ordinance's other test—"connection with criminal elements"—is void for vagueness. Atari will not discuss that aspect of the case, however, because it is not of general interest to Atari or the industry. Moreover, Atari notes that Mesquite's repeal of the "connection with criminal elements" provision may render that aspect of the appeal moot.

which Article III of the Constitution precludes. The appeal should, therefore, be dismissed, and certiorari should be denied.

THIS CASE DOES NOT DESERVE PLENARY REVIEW

Treating Mesquite's Jurisdictional Statement as a petition for a writ of certiorari pursuant to 28 U.S.C. §2103, this Court should deny certiorari. Adequate, independent state-law grounds support the Court of Appeals' judgment. *Cf. Wolf* v. *Weinstein*, 372 U.S. 633, 636 (1963). As a prudential matter, the Court should also decline to decree constitutional doctrine grounded on the inadequate record in this case. Moreover, resolution of the questions Mesquite raises in its Jurisdictional Statement is not required since the judgment of the Court of Appeals is correct on other grounds.

A Poor Record Comes Before this Court

The record before this Court is inadequate for the Court to examine the general constitutional validity of a flat prohibition on children playing coin-operated games. In enacting its age-limitation ordinance and defending it in the lower Courts, Mesquite tendered no evidence of the effect of coin-operated games themselves on young patrons. Moreover, Mesquite failed ever to substantiate its declaration that "the congregation of youthful persons [at game centers] creates problems of policing due to the need to protect such patrons from the influences of those who would promote gambling, sale of narcotics and other unlawful activities . . . ." 434 F.Supp. at 476. As the Court of Appeals found:

> [T]he record is entirely devoid of evidence that a person under seventeen years of age has been exposed to a person "who would promote gambling, [the] sale of narcotics and other unlawful activities" while in a coin-operated amusement center in Mesquite. The district

> court recognized, as we do, that the city presented no evidence that such people ever come to these centers. Initially, therefore, we note that the city failed to demonstrate any need which would give rise to an interest in protecting its young citizens from corrupt influences in amusement centers.

630 F.2d at 1040. In this Court, Mesquite glosses its failure of proof. Rather, it seeks to sustain its ordinance on the basis of a presumption of legislative validity. (Appellant's Br. 12-13).

This Court has taught that poor factual records, such as in this case, provide a weak foundation upon which to build constitutional principles.

> [T]he record is not adequate for disposition of the case in terms of its constitutional problems. . . . We should consider it [the judgment below] if, and only if, we should and can dispose of it on its record in terms of constitutional principle. The Court's disposition of this case is based upon the sound premise that we should not use our certiorari jurisdiction to express our views on a point in a case which we cannot dispose of because of inadequacies of the record which cannot realistically be remedied.

Massachusetts v. *Painten*, 389 U.S. 560, 561-62 (1968) (Fortas, J., concurring). See also *Wainwright* v. *New Orleans*, 392 U.S. 598, 598-600 (1968) (Fortas and Marshall, JJ., concurring); *Kimbrough* v. *United States*, 364 U.S. 661 (1961).

The presence of novel constitutional issues in this case makes the weaknesses in the record even more serious. The Court of Appeals grounded its judgment, in part, on a new-found "right of social association." The District Court never considered the "right of social association," however, and the parties never addressed the issue there or in the Fifth Circuit Court of Appeals. Moreover, no other Court of Appeals has

yet discerned a similar right, much less created a conflict with the Fifth Circuit. Under these circumstances, the language of *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959), bears repeating:

> "While this Court decides questions of public importance, it decides them in the context of meaningful litigation. . . . Resolution here of the extent to which these bill of lading provisions may be given effect in our courts can await a day when the issue is posed less abstractly."

359 U.S. at 184. Similarly, resolution here of youths' liberty interests in playing coin-operated games can better await another, fully-litigated case.

The Judgment of the Court of Appeals is Correct

This Court should also deny the petition for a writ of certiorari, or summarily affirm, in light of the fact that the Court of Appeals judgment is clearly correct.

The Court of Appeals invalidated Mesquite's age restriction ordinance on the grounds both that it impermissibly abridged young people's "right of social association" and that it lacked a rational basis. Because the age provision promotes no legitimate governmental interest, it has no rational basis as required by the due process clause of the Fourteenth Amendment. *Western and Southern Life Insurance Co.* v. *State Board of Equalization of California*, —U.S.—, 49 U.S.L.W. 4942, 4947 (1981).

The Court recently struck down an act of Congress for failure to satisfy the rational basis test in *United States Department of Agriculture* v. *Monreno*, 413 U.S. 528 (1973). The statute at issue in *Monreno* barred food stamps to households whose members were not all related. The Court determined from the legislative history that the actual purpose of that provision, as opposed to its purported purpose of

preventing "abuse of the program," was to deny food stamps to "hippies" or people living in "communes." In language appropriate to the present case, the Court held:

> For if the constitutional conception of 'equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.

413 U.S. at 534 (emphasis in the original). Cf. *Oestereich* v. *Selective Service System,* 393 U.S. 233 (1968).

Similarly, in *United States Railroad Retirement Board* v. *Fritz,* —U.S.—, 101 S.Ct. 453 (1980), the Court held that Congress could exclude certain employees from the class whose rights to retirement benefits were grandfathered "absent some reason to infer antipathy" toward the excluded group. 101 S.Ct. at 461 n.12, quoting *Vance* v. *Bradley,* 440 U.S. 93, 97 (1979). As Justice Stevens' concurrence put it, "If the adverse impact of the disfavored class is an apparent aim of the legislature, its impartiality would be suspect." 101 S.Ct. at 462.

Here, the adverse impact is so apparent an aim of the Mesquite City Council, and the target is so obviously Aladdin's and only Aladdin's, that Aladdin's could successfully have attacked the ordinance putting it out of business as a bill of attainder. As a bill of attainder, the Mesquite ordinance lacks the "legitimate governmental interest" necessary to satisfy the rational basis test.

The record reveals Mesquite's unfair efforts to stymie Aladdin's. Aladdin's first persuaded the Mesquite City Council to alter its zoning and licensing ordinances to make it possible for Aladdin's to operate. Mesquite amended its licensing ordinance to permit children over the age of six to enter game centers which enforced the operating policies to which Aladdin's adhered. Aladdin's then signed a ten-year

lease at a monthly rental of about $2,400.00 and spent approximately an additional $90,000 preparing the property for operations.

Mesquite then backtracked. It first denied Aladdin's a license under an ordinance referring to "connections with criminal elements." The reason was that Aladdin's parent company and its president had once been indicted—and acquitted—on charges of participation in racketeering and gambling activities. Aladdin's sued for injunctive relief in state court and won. The trial court held the ordinance impermissibly vague, general, and indefinite. The court also found that no evidence supported denying Aladdin's a license and that neither Aladdin's nor its parent had any connections with criminal elements. Mesquite issued the license and gave notice of appeal. (Subsequently, the judgment of the state trial court was affirmed.)

While Mesquite's appeal of the state-court judgment was pending, however, the city adopted Ordinance No. 1353, at issue here, which repealed Aladdin's exemption and restored the seventeen year-old age limitation. The City Council knew from its prior negotiations with Aladdin's that the age restriction would make the amusement center unprofitable and force Aladdin's to close it.

Mesquite now defends this new ordinance on the basis of an alleged desire to prevent truancy and delinquency. As the City Council knew, however, Aladdin's has an adult manager on the premises at all times in all its centers to enforce its rules against gambling, smoking, and consumption of food and beverages. Moreover, Aladdin's does not permit children of school age on the premises during school hours. Consideration of such policies persuaded the City Council to exempt Aladdin's in the first place. The policies have not changed and the City Council made no attempt to incorporate Aladdin's operating policies into the new

ordinance. Instead, the new Ordinance No. 1353 redefined "connection with criminal elements" and imposed the age limitation in a double-barreled effort to put Aladdin's out of business. Mesquite is again attempting to do what the state courts held it could not do; its age requirement serves no other purpose. Mesquite would punish Aladdin's and destroy its business solely because its parent corporation was once indicted.

Mesquite's rifle-shot ordinance amounts to a bill of attainder. The bill of attainder clause is "not to be given a narrow historical reading . . ., but [is] instead to be read in light of the evil the Framers had sought to bar: legislative punishment of any form or severity, of specially designated persons or groups." *United States* v. *Brown*, 381 U.S. 437, 447 (1965). The clause bans "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial . . . ." *United States* v. *Lovett*, 328 U.S. 303, 315 (1946), quoted with approval in *United States* v. *Brown*, *supra*, 381 U.S. at 448-49. Like a bill of attainder, the reinstatement of the age requirement was a legislative act. It afforded Aladdin's none of the protections of a judicial trial before depriving the amusement center of the business of Mesquite's youth.

The Mesquite ordinance also shares two other characteristics of a bill of attainder. The age requirement focused on an "easily ascertainable member[ ] of a group . . . ." *United States* v. *Lovett*, *supra*, 381 U.S. at 315. Only Aladdin's investment and business are to be destroyed.

The new ordinance, moreover, unquestionably "inflict[ed] punishment" upon Aladdin's. *Nixon* v. *Administrator of GSA*, 433 U.S. 425, 472 (1977). As this Court noted in the *Nixon* case, the constitutional prohibition of bills of attainder extends to a "wide array" of punishments' including

"a legislative enactment barring designated individuals or groups from participation in specified employments or vocations . . . ." 433 U.S. at 474.[2]

The complete record demonstrates that the only motivation for Mesquite's new ordinance is a specific antipathy toward Aladdin's—not because of anything it did, but because of its parent's identity. Because Mesquite's desire to harm Aladdin's constitutes no legitimate governmental purpose, *United States Department of Agriculture* v. *Monreno, supra,* 413 U.S. at 534, its ordinance fails to have a rational basis. The upshot is that the judgment below is clearly correct and the case does not warrant plenary review.[3]

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[2]Just as the Court did not allow Missouri and Congress to use oath requirements to prohibit, in effect, individuals from serving as priests and from practicing law, *see Cummings* v. *Missouri,* 71 U.S. (4 Wall.) 277 (1867), the Court should not permit Mesquite to use an age requirement to prohibit Aladdin's from operating an amusement center. Similarly, just as the Court did not let Congress prevent alleged "subversives" from receiving their salaries from the federal government, *see United States* v. *Lovett,* 328 U.S. 303 (1946), or preclude Communist Party members from serving as union officials, *see United States* v. *Brown,* 381 U.S. 437 (1965), the Court should not tolerate Mesquite's attempt to bar Aladdin's from the amusement center business.

[3]The Fifth Circuit's additional, and novel rationales for the invalidity of the ordinance do not themselves warrant review since "[t]his Court reviews . . . judgments, not statements in opinions." *Black v. Cutter Laboratories,* 351 U.S. 292, 297 (1956). Moreover, this Court has recently reiterated that "[a]s a prudential matter it is our practice to avoid the unnecessary decision of novel constitutional questions." *Leroy* v. *Great Western United Corp.,* 443 U.S. 173, 181 (1979).

CONCLUSION

Atari, Inc., as *amicus curiae,* resepctfully suggests that the appeal should be dismissed and the petition for a writ of certiorari denied.

DATED: September 1, 1981

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